

**EXHIBIT 2**  
**(Redacted)**

**(Previously Filed Under Seal as DI 374-1)**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

CASE NUMBER: 16-cv-1054 (WMW/DTS)

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Fair Isaac Corporation, a Delaware corporation,  
Plaintiff,  
versus  
Federal Insurance Company, and Indiana  
corporation, and ACE American Insurance Company, a  
Pennsylvania corporation,  
Defendants.  
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VIDEOTAPED DEPOSITION OF EXPERT WITNESS

STEVEN KURSH

TAKEN: 25 June 2019

BY: Jackie McKone



<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 MERCHANT GOULD</p> <p>80 South Eighth Street, Suite 3200</p> <p>4 Minneapolis, Minnesota 55402</p> <p>PHONE: (612) 332-5300</p> <p>5 FAX: (612) 332-9081</p> <p>E-MAIL: hkliebenstein@merchantgould.com</p> <p>6</p> <p>BY: Heather Kliebenstein</p> <p>7 For the Plaintiff</p> <p>8</p> <p>9 FREDRIKSON BYRON</p> <p>200 South Sixth Street, Suite 4000</p> <p>10 Minneapolis, Minnesota 55402</p> <p>PHONE: (612) 492-7000</p> <p>11 FAX: (612) 492-7077</p> <p>E-MAIL: tfleming@fredlaw.com</p> <p>12</p> <p>BY: Terrence Fleming</p> <p>13 For the Defendants</p> <p>14</p> <p>15</p> <p>16 Also present:</p> <p>17 James Woodward, FICO</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22 Videographer: Kyle Peterson, Paradigm</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 PROCEEDINGS</p> <p>2 The following is the videotaped deposition</p> <p>3 of expert witness Steven Kursh taken at Merchant</p> <p>4 Gould, 80 South Eighth Street in Minneapolis,</p> <p>5 Minnesota commencing at 9:36 a.m. on 25 June 2019</p> <p>6 pursuant to notice.</p> <p>7 * * *</p> <p>8 THE VIDEOGRAPHER: Good morning we are</p> <p>9 going on the record. The time is 9:36 a.m. 0</p> <p>10 Today's date is June 25th, 2019.</p> <p>11 Please note that the microphones are</p> <p>12 sensitive. They pick up whispering private</p> <p>13 conversations, cellular interference. Please turn</p> <p>14 off all cellphones or place them away from the</p> <p>15 microphones as they can interfere with the</p> <p>16 deposition's audio. Audio and video recording</p> <p>17 will continue to take place unless all parties</p> <p>18 agree to go off the record.</p> <p>19 This is Media Unit 1 of the video recorded</p> <p>20 deposition of Steven Kursh taken by counsel for</p> <p>21 the plaintiff in the matter of Fair Isaac</p> <p>22 Corporation versus Federal Insurance Company et</p> <p>23 al. filed in the United States District Court,</p> <p>24 District of Minnesota. This deposition is being</p> <p>25 held at Merchant and Gould PC located at 80 South</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX</p> <p>2</p> <p>3 Examination by Ms. Kliebenstein, Page 6</p> <p>4</p> <p>5 EXHIBITS</p> <p>6</p> <p>7 Exhibit 513 Kursh expert report, Page 7</p> <p>8 Exhibit 514 Ruling/Kursh testimony, Page 49</p> <p>9 Exhibit 515 Ruling/Kursh testimony, Page 49</p> <p>10 Exhibit 516 Sizing matrix, Page 96</p> <p>11</p> <p>12 PREVIOUSLY MARKED EXHIBITS</p> <p>13</p> <p>14 Exhibit 314 Software agreement, Page 119</p> <p>15 FICO 0002276-2296</p> <p>16 Exhibit 421 Global price list, Page 80</p> <p>17 FICO 0057386-7412</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 Eighth Street, Suite 3200, Minneapolis, Minnesota</p> <p>2 55402.</p> <p>3 My name is Kyle Peterson from the firm</p> <p>4 Veritext Legal Solutions. I'm the videographer.</p> <p>5 The court reporter is Jackie McKone from the firm</p> <p>6 Veritext Legal Solutions. I am not authorized to</p> <p>7 administer an oath. I'm not related to any</p> <p>8 party in this action or am I financially</p> <p>9 interested in the outcome.</p> <p>10 Counsel would you please identify</p> <p>11 yourselves and the parties you represent.</p> <p>12 MS. KLIEBENSTEIN: Heather Kliebenstein for</p> <p>13 Merchant Gould on -- on behalf of the plaintiff.</p> <p>14 MR. FLEMING: Terry Fleming of the</p> <p>15 Fredrikson firm representing defendants.</p> <p>16 MS. KLIEBENSTEIN: Terry, did you -- are we</p> <p>17 good on the screen? Did you just look through the</p> <p>18 video?</p> <p>19 MR. FLEMING: I did.</p> <p>20 MS. KLIEBENSTEIN: Okay.</p> <p>21 MR. FLEMING: Yeah.</p> <p>22 THE VIDEOGRAPHER: Would the reporter</p> <p>23 please swear in the witness, and then we can</p> <p>24 proceed.</p> <p>25 * * *</p>



<p style="text-align: right;">Page 6</p> <p>1 STEVEN KURSH</p> <p>2 after having been duly sworn deposes and says</p> <p>3 under oath as follows.</p> <p>4 * * *</p> <p>5 EXAMINATION</p> <p>6 BY MS. KLIEBENSTEIN:</p> <p>7 Q. Good morning Mr. Kursh. How are you today?</p> <p>8 A. Good morning Ms. Kliebenstein. Is that -- is that</p> <p>9 how it's pronounced?</p> <p>10 Q. It is.</p> <p>11 A. Good morning.</p> <p>12 Q. So I assume you've been deposed before.</p> <p>13 A. Yes.</p> <p>14 Q. So you know the ground rules generally?</p> <p>15 A. Every attorney has his or her own style. So be</p> <p>16 helpful please if you could review your ground</p> <p>17 rules.</p> <p>18 Q. Well, I don't think I have too many. On behalf of</p> <p>19 the court reporter, she prefers verbal answers</p> <p>20 instead of -- instead of head shakes. If you need</p> <p>21 a break at any time, just let me know, we can take</p> <p>22 a break, and if there's something that isn't clear</p> <p>23 about my question, feel free to let me know, and I</p> <p>24 can try to rephrase so that we can move forward.</p> <p>25 So Mr. Kursh, you have been -- who has</p>	<p style="text-align: right;">Page 8</p> <p>1 A. Okay. Well, as long as we know that. So if you</p> <p>2 will stipulate this is in fact a true and accurate</p> <p>3 copy, then I'll assume it is without having to go</p> <p>4 through it page by page.</p> <p>5 Q. I will.</p> <p>6 A. Okay. So if we take a look please at Paragraph</p> <p>7 12, Page 6, it discuss -- that lists what I was</p> <p>8 asked to do. I can read it if you'd like.</p> <p>9 Q. No thank you, and what is your claimed area of</p> <p>10 expertise in this case?</p> <p>11 A. It's management of software companies, customs and</p> <p>12 practices in the software industry, particularly</p> <p>13 as it regards to licensing.</p> <p>14 Q. Anything else?</p> <p>15 A. Within the general category of management of</p> <p>16 software companies, there would be other</p> <p>17 categories that I have touched on in my report.</p> <p>18 For example, an understanding of how the</p> <p>19 technologies behind software applications as one</p> <p>20 example. Another example would be an</p> <p>21 understanding of -- and I discuss this in the</p> <p>22 report, the software industry overall.</p> <p>23 So for example, if you turn to Page 14 of</p> <p>24 my report, you will find a discussion about the</p> <p>25 software industry. So, again, an area of my</p>
<p style="text-align: right;">Page 7</p> <p>1 retained you in this matter?</p> <p>2 A. I've been retained by my -- the law firm that Mr.</p> <p>3 Fleming is with on behalf of the defendant Federal</p> <p>4 Insurance.</p> <p>5 Q. And what were you retained to do, what services?</p> <p>6 A. I was retained -- if you take a look at my report,</p> <p>7 you may have a copy of it, I'll reference you to a</p> <p>8 specific paragraph as to what I was retained to</p> <p>9 do.</p> <p>10 Q. Certainly.</p> <p>11 (Whereupon material was marked for</p> <p>12 identification as Exhibit 513.)</p> <p>13 BY MS. KLIEBENSTEIN:</p> <p>14 Q. I'm handing you what has been marked as Exhibit</p> <p>15 513, and can you identify Exhibit 513 for me?</p> <p>16 A. It appears to be a copy of my report, and if you</p> <p>17 will confirm that it is in fact an exact copy,</p> <p>18 although I know there are some documents missing,</p> <p>19 the appendices.</p> <p>20 Q. I'll give you a little heads up. Your report was</p> <p>21 over 300 pages long with the attachments, and so I</p> <p>22 made an exhibit of the full length of your report</p> <p>23 and then the first few attachments but not the</p> <p>24 lengthy last attachment, which I believe is a</p> <p>25 lengthy article, maybe a book.</p>	<p style="text-align: right;">Page 9</p> <p>1 expertise is the software industry, management of</p> <p>2 companies within the software industries. I</p> <p>3 discuss in there beginning at Paragraph 47 an</p> <p>4 overview of the software industry. I discuss</p> <p>5 licensing and distribution to licensees. That</p> <p>6 begins at Paragraph 55. I -- I discuss enterprise</p> <p>7 software agreements and other contracts beginning</p> <p>8 in Paragraph 58. I discuss licensing terms</p> <p>9 beginning in Paragraph 61. I discuss background</p> <p>10 on software and services pricing in Paragraph 62.</p> <p>11 So all of those would be within the general</p> <p>12 category.</p> <p>13 I note as well while I'm here that what I</p> <p>14 do not discuss and will not, if you turn please to</p> <p>15 Page 7, I'll reference you to Paragraph 18, I'm</p> <p>16 not a lawyer and this report provides no legal</p> <p>17 opinions. Rather I have reviewed the facts in</p> <p>18 this case in drawing upon my knowledge, skills,</p> <p>19 experience, training, and education. I've</p> <p>20 provided my opinions related to the actions of the</p> <p>21 parties in this matter. So I will not be</p> <p>22 discussing any legal issues. For example,</p> <p>23 discussion of terms that may be perceived by the</p> <p>24 court or the trier in fact and/or with ambiguity.</p> <p>25 There are other examples as well that I can</p>



<p style="text-align: right;">Page 10</p> <p>1 provide if you give me more time.</p> <p>2 Q. Just so I'm clear, you stated that you won't be</p> <p>3 testifying on legal issues, which I understand,</p> <p>4 and then I -- just to make sure I understood that</p> <p>5 last part, you mentioned the phrase terms which</p> <p>6 may be perceived with ambiguity. Did I catch</p> <p>7 that; right?</p> <p>8 A. Correct.</p> <p>9 Q. And what exactly do you mean by that?</p> <p>10 A. If a term is perceived in a contract with respect</p> <p>11 to contract interpretation, the ambiguity of a</p> <p>12 term, that's the province of the courts and/or the</p> <p>13 trier of fact. I won't be talking about that.</p> <p>14 Q. Do you mean the determination of whether a term is</p> <p>15 ambiguous is for the court?</p> <p>16 A. Correct.</p> <p>17 Q. Okay. In your opinions, do you -- are your</p> <p>18 opinions premised on a belief, whether it's</p> <p>19 supplied by counsel or not, that the terms you</p> <p>20 discuss in your report are ambiguous?</p> <p>21 A. No.</p> <p>22 Q. Are your opinions based on an understanding that</p> <p>23 the terms are not ambiguous?</p> <p>24 A. I'm not dealing with ambiguity at all, whether</p> <p>25 terms are ambiguous or not ambiguous. I've taken</p>	<p style="text-align: right;">Page 12</p> <p>1 be more specific.</p> <p>2 Q. I'm not clear on what types of experience falls</p> <p>3 under the category of management of software</p> <p>4 companies. So I'm -- I'm looking to you to flesh</p> <p>5 that out a little bit for me if you could.</p> <p>6 A. Sure. I assume you've taken the time to visit my</p> <p>7 website, the Software Analysis Group.</p> <p>8 Q. Yes.</p> <p>9 A. Do you have the cover page there with respect to</p> <p>10 about us?</p> <p>11 Q. For your software page?</p> <p>12 A. For my Software Analysis Group page.</p> <p>13 Q. I do not.</p> <p>14 A. Okay. If you look at that page, it talks about --</p> <p>15 I don't know it by memory, although I wrote that,</p> <p>16 I don't know by memory, but again, put it in, part</p> <p>17 of that I put in.</p> <p>18 The management would include for example</p> <p>19 software development, which is a broad category</p> <p>20 per the IEEE computer society. It's a software</p> <p>21 development life cycle. It would include</p> <p>22 management of personnel. It would include</p> <p>23 marketing as well as sales. It would include</p> <p>24 customer support services. It would include from</p> <p>25 a business perspective licensing, i.e.,</p>
<p style="text-align: right;">Page 11</p> <p>1 the facts in this matter and combined with my</p> <p>2 knowledge, skills, education, experience, and</p> <p>3 training have considered those as well as</p> <p>4 particularly my experience in the context of</p> <p>5 customs and practices in the software industry,</p> <p>6 and specifically in regard to licensing.</p> <p>7 Q. So just to recap, looking at your opinions,</p> <p>8 whether or not a term is ambiguous that is not a</p> <p>9 -- a subject of your opinions?</p> <p>10 A. Correct.</p> <p>11 MR. FLEMING: Objection. Asked and</p> <p>12 answered.</p> <p>13 BY MS. KLIEBENSTEIN:</p> <p>14 Q. You mentioned one of your areas of claimed</p> <p>15 expertise is the management of software companies;</p> <p>16 is that correct?</p> <p>17 A. Yes.</p> <p>18 Q. And give me an example of what exactly is</p> <p>19 management of software companies.</p> <p>20 A. You'll need to be more specific with your</p> <p>21 question.</p> <p>22 Q. Certainly. I'm --</p> <p>23 A. For example, you might -- management of software</p> <p>24 companies may be the kind of software -- well, go</p> <p>25 ahead. You'll have to give me -- you'll have to</p>	<p style="text-align: right;">Page 13</p> <p>1 negotiating the terms and asking counsel to paper</p> <p>2 it. Those are some of the things that would be in</p> <p>3 the software management.</p> <p>4 Also of course intellectual property. I</p> <p>5 have companies that I do consulting in this as</p> <p>6 well. Not expert but consulting as well. How do</p> <p>7 you manage intellectual property. For example,</p> <p>8 protection of trade secrets, or how do you manage</p> <p>9 personnel with respect to confidential proprietary</p> <p>10 information.</p> <p>11 Those are some examples. I'm sure I could</p> <p>12 think of more if I had the time.</p> <p>13 Q. In your experience in the management of software</p> <p>14 companies, have you ever written code?</p> <p>15 A. Yes.</p> <p>16 Q. Have you ever developed software programs?</p> <p>17 A. Yes.</p> <p>18 Q. And with respect to writing code, how recent --</p> <p>19 how recent would you say you -- how recently would</p> <p>20 you say you've written code for a software</p> <p>21 application?</p> <p>22 A. In the last month.</p> <p>23 Q. And tell me about that project. What -- what type</p> <p>24 of program? What type of application were you</p> <p>25 working with?</p>



<p style="text-align: right;">Page 14</p> <p>1 A. This is an Apple -- well, I'll go two places here.</p> <p>2 Because some of this also ties into some of the</p> <p>3 work I did when I was a professor, but this</p> <p>4 relates to Fintech, and particularly with the use</p> <p>5 of PHP in writing code that was going to be or</p> <p>6 potentially will be used in a financial services</p> <p>7 company with respect to assessment of personnel,</p> <p>8 and also with some of the pricing, and there's</p> <p>9 some other things that it does as well.</p> <p>10 Q. And who are the customers or potential customers</p> <p>11 for that software program?</p> <p>12 A. It's financial institutions.</p> <p>13 Q. Is -- understood what Fintech means. Is there</p> <p>14 anything more specific beyond financial</p> <p>15 institutions in general, or is it all financial</p> <p>16 institutions?</p> <p>17 A. I wouldn't say all financial institutions, but one</p> <p>18 of the issues that you have when you write code in</p> <p>19 any -- particularly in the early stages is you do</p> <p>20 a general design of it, and you do mockups. We</p> <p>21 often call it -- not -- and it's not my term,</p> <p>22 minimum viable product. So I'm in the process of</p> <p>23 developing that MVP if you will, and then together</p> <p>24 with some other people will be presenting that the</p> <p>25 at various Fintech and blockchain conferences or</p>	<p style="text-align: right;">Page 16</p> <p>1 I was a newspaper boy when I was in sixth grade.</p> <p>2 So you'll have to define sort of when career</p> <p>3 begins.</p> <p>4 Q. What was the first job that you held after</p> <p>5 college?</p> <p>6 A. I went straight from college to graduate school.</p> <p>7 So I did not have a full-time job after college</p> <p>8 until becoming a college professor.</p> <p>9 I worked on -- as a part-time employee for</p> <p>10 organizations when I was in college and when I was</p> <p>11 in graduate school, and summers, but my first real</p> <p>12 job on a full-time basis was as a college</p> <p>13 professor.</p> <p>14 As my father joked, so you finally have a</p> <p>15 real job. So ...</p> <p>16 Q. When you -- and that was after you graduated --</p> <p>17 after you got your PhD; is that correct?</p> <p>18 A. I actually began my career as a professor</p> <p>19 full-time before my PhD was done.</p> <p>20 Q. Okay, and what were the -- what were the subjects</p> <p>21 of your -- of your professorship at that time?</p> <p>22 A. I taught courses -- well, let's take a step back.</p> <p>23 I've had a long career as a professor. I've</p> <p>24 taught a variety of courses, which we can spend as</p> <p>25 much time going through as you would like, but</p>
<p style="text-align: right;">Page 15</p> <p>1 opportunities. We'll listen to what people have</p> <p>2 to say, we'll go back, we'll revise the code,</p> <p>3 revise what we're trying to do is a iterative</p> <p>4 process.</p> <p>5 Q. And what is the problem that the current program</p> <p>6 you're working on? What problem is it trying to</p> <p>7 solve in the Fintech industry?</p> <p>8 A. One of the issues you have, particularly with the</p> <p>9 use of blockchain, is the number of transactions</p> <p>10 you can handle at the same time. There are</p> <p>11 constraints with hardware in that development</p> <p>12 environment.</p> <p>13 We may have a way to mitigate some of those</p> <p>14 issues, although of course as with most software</p> <p>15 companies, all of us in that industry will benefit</p> <p>16 from increasing power of hardware, but still we</p> <p>17 have an issue of our blockchain company.</p> <p>18 Q. Did you -- keeping on the Fintech topic, did you</p> <p>19 start your career as a consultant in the financial</p> <p>20 services industry?</p> <p>21 A. I started my career working in middle school at a</p> <p>22 family building supply distribution company, and</p> <p>23 part of the work I did going through high school</p> <p>24 it involved writing code for -- that was COBOL</p> <p>25 code. If you want to say my career sort of work,</p>	<p style="text-align: right;">Page 17</p> <p>1 initially when I began at Northeastern, I taught</p> <p>2 courses in finance, real estate finance, and</p> <p>3 economics is the best I can recall as I sit here.</p> <p>4 Those were both undergraduate and graduate</p> <p>5 courses.</p> <p>6 Q. And what was the subject of your PhD work?</p> <p>7 A. You're going to have to be more specific please.</p> <p>8 Q. What is your degree, your PhD degree?</p> <p>9 A. I have a PhD degree from the University of</p> <p>10 Pennsylvania. As discussed in my CV, I have -- I</p> <p>11 did a multidisciplinary PhD.</p> <p>12 If you take a look on my CV, I'll reference</p> <p>13 you to Page 5 of my CV, I did work -- I took</p> <p>14 preliminary examinations. In other words, at Penn</p> <p>15 at that time, you would choose three areas of</p> <p>16 focus, and you would take courses in those areas.</p> <p>17 You would then have to pass a preliminary exam.</p> <p>18 As you can see from the courses I took, and</p> <p>19 accordingly preliminary exams, I had a</p> <p>20 multidisciplinary PhD. I was particularly</p> <p>21 interested in urban policy then, and hence my work</p> <p>22 was in housing and real estate, finance, and</p> <p>23 marketing.</p> <p>24 Q. And then you became a professor, and my question</p> <p>25 is this: From the time you received your PhD up</p>



<p style="text-align: right;">Page 18</p> <p>1 until -- well, let me ask it a different way.</p> <p>2 It appears you were teaching primarily</p> <p>3 finance and real estate finance. For how long did</p> <p>4 you teach those subjects?</p> <p>5 A. The last course I taught before retiring from</p> <p>6 Northeastern was in finance. It was a course with</p> <p>7 disruption in the financial services and insurance</p> <p>8 industries, and that course, like many courses I</p> <p>9 taught, was within the finance group, but</p> <p>10 particularly after my return to Northeastern, many</p> <p>11 of my business classes also had some software</p> <p>12 engineering, as well as my teaching in the</p> <p>13 engineering.</p> <p>14 Q. Have you ever taught courses on software</p> <p>15 licensing?</p> <p>16 A. I've taught courses that have covered software</p> <p>17 licensing. I've never taught a specific course on</p> <p>18 software licensing.</p> <p>19 Q. And at some point in time, you started a company</p> <p>20 called Blackstone; correct?</p> <p>21 A. Incorrect.</p> <p>22 Q. Incorrect? Tell me where I'm wrong. Blackacre.</p> <p>23 I apologize. Did that solve the problem?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. So you were the founder of Blackacre;</p>	<p style="text-align: right;">Page 20</p> <p>1 evaluating commercial loan officers.</p> <p>2 I have also provided consulting services to</p> <p>3 the banking industry as well as other financial</p> <p>4 institutions listed again, Omega.</p> <p>5 In starting Blackacre, I was interested in</p> <p>6 developing software that would be used in the</p> <p>7 mortgage origination process. This was a time</p> <p>8 when the federal government had recently</p> <p>9 deregulated parts of the home mortgage market. It</p> <p>10 was also a time of significant growth and</p> <p>11 innovation in what we call -- by we, not me but</p> <p>12 other people, the secondary mortgage market, the</p> <p>13 mortgage-backed securities.</p> <p>14 Additionally, in my home state,</p> <p>15 Massachusetts, there were institution that had</p> <p>16 charters from the state and which case they could</p> <p>17 be somewhat more innovative particularly in doing</p> <p>18 adjustable rate loans as well as other kinds of</p> <p>19 instruments. For example, what they call now</p> <p>20 accounts, which are expensing accounts that paid</p> <p>21 interest. At that time, it was innovation.</p> <p>22 So initially the software I wrote was used</p> <p>23 for people who would be doing mortgage</p> <p>24 originations. It would assess the particular</p> <p>25 borrower or borrowers and provide to them a list</p>
<p style="text-align: right;">Page 19</p> <p>1 correct?</p> <p>2 A. Correct. Although the company went through some</p> <p>3 different name iterations, but yes.</p> <p>4 Q. Okay, and when -- when generally, what year did</p> <p>5 you found Blackacre?</p> <p>6 A. Well, this is right out of my CV. I started</p> <p>7 Blackacre in 1986 September, and as it's showing</p> <p>8 in the CV, I had a positive liquidity event in</p> <p>9 1993. I then stayed on for an additional year to</p> <p>10 assist with the transition. A company -- assets</p> <p>11 were acquired by McGraw -- a division of</p> <p>12 McGraw-Hill, and then I left effectively as of</p> <p>13 August 1994 and returned back to academia.</p> <p>14 Q. What types of products or services did Blackacre</p> <p>15 sell?</p> <p>16 A. In what time frame?</p> <p>17 Q. Why don't you start at the beginning.</p> <p>18 A. I may be leaving some products out, but initially</p> <p>19 we began -- based on my work -- if you take a look</p> <p>20 from -- again, on the CV, from May 1984 to</p> <p>21 September 1986 when I worked at Omega, the third</p> <p>22 bullet point, I designed and developed software</p> <p>23 that linked the company's commercial credit</p> <p>24 products with credit analysis software. I</p> <p>25 developed tests and statistical norms for</p>	<p style="text-align: right;">Page 21</p> <p>1 of recommended products, mortgage products that --</p> <p>2 whether it was being -- those products were being</p> <p>3 offered by a financial institution, or a mortgage</p> <p>4 broker, or mortgage banker, and then that software</p> <p>5 was written.</p> <p>6 Based on that experience and talking with a</p> <p>7 variety of financial institutions, we learned that</p> <p>8 what they were really interested in was just not</p> <p>9 that front end of the whole cycle or process of</p> <p>10 mortgage lending. They were also interested in</p> <p>11 mortgage processing software. So we developed</p> <p>12 software called the Home Sweet Home network.</p> <p>13 We also sought at a very early stage to</p> <p>14 link up that origination process with real estate</p> <p>15 brokers so that brokers using their computers</p> <p>16 would be able to -- or someone designated in a</p> <p>17 real estate broker's office would be able to tie</p> <p>18 in -- find a mortgage that would work for a --</p> <p>19 prospective borrowers, and then begin that</p> <p>20 mortgage process, which by the way didn't work out</p> <p>21 very well. A major investment banking company out</p> <p>22 of New York got into that business, but we can</p> <p>23 talk more about that later if you would like, but</p> <p>24 -- so we licensed software that was used for</p> <p>25 mortgage processing and mortgage origination.</p>



<p style="text-align: right;">Page 22</p> <p>1 We also then grew, and expanded, and really</p> <p>2 found our major niche in software that would be</p> <p>3 used by in the east coast attorneys during real</p> <p>4 estate closings. Of course all during this time,</p> <p>5 we're modifying the software, and we can talk</p> <p>6 about the architectural a little bit later because</p> <p>7 it's really a critical factor in the success of</p> <p>8 the company.</p> <p>9 We grew very quickly, real estate closings,</p> <p>10 and then expanded across the country. So our</p> <p>11 client base changed from not just closing</p> <p>12 attorneys but escrow companies, for example in</p> <p>13 California, which at that time was by far the</p> <p>14 leading state in home sales. Title companies, for</p> <p>15 example in many parts of the Midwest, and we then</p> <p>16 expanded as well.</p> <p>17 We had scores of distributors of our</p> <p>18 products as well as value added resellers, and</p> <p>19 this was for a high end product we sold, and here</p> <p>20 a little bit on architecture, we had developed</p> <p>21 software that would fit the needs of local</p> <p>22 markets. In other words, if you go back to your</p> <p>23 real property class in law school when you learned</p> <p>24 about blackacre, not the company but the term,</p> <p>25 real estate is done differently around the</p>	<p style="text-align: right;">Page 24</p> <p>1 what was essentially hard coded software to what</p> <p>2 nowadays is called open architecture, and we had</p> <p>3 links with our software. Nowadays that would be</p> <p>4 an API, an application program interface, in those</p> <p>5 days that term wasn't yet created, so that if it</p> <p>6 was an escrow company in Dallas, Texas, how Dallas</p> <p>7 would work, we would have these pieces that you</p> <p>8 would assemble -- think for example of archery</p> <p>9 where you've got the center of the chart, that's</p> <p>10 the kernel of our code, and then the concentric</p> <p>11 circles.</p> <p>12 So would it be for residential lending or</p> <p>13 commercial lending, (inaudible), would it be in</p> <p>14 this state, would it be in this area. So we had</p> <p>15 these templates built that would fit each one of</p> <p>16 these areas.</p> <p>17 Most of those were developed by our value</p> <p>18 added resellers. We had value added resellers all</p> <p>19 over the country, we even evaluated outside of the</p> <p>20 country, and they would build these templates of</p> <p>21 rules and variables to fit their particular area.</p> <p>22 They would then implement the software at the</p> <p>23 particular licensee site, and because we had an</p> <p>24 open architecture, licensees could also do their</p> <p>25 own customization, stuff as simple as instead of</p>
<p style="text-align: right;">Page 23</p> <p>1 country. At closings for residential properties,</p> <p>2 the taxes that are collected, how they are</p> <p>3 escrowed, how they are calculated, not just</p> <p>4 transfer taxes but local real estate taxes, how</p> <p>5 lenders would set up their loans, and this was at</p> <p>6 the second -- beginning secondary markets taking</p> <p>7 off. So the bank doing origination needed to make</p> <p>8 sure that all the documents were done correctly.</p> <p>9 Because if not, when they would package those</p> <p>10 until mortgage-backed security, with volatile</p> <p>11 interest rates, the organizations that made a</p> <p>12 commitment to buy that mortgage-backed security</p> <p>13 would kick it back, whether it was Fannie Mae or</p> <p>14 Freddie Mac approval needed, or -- or the -- also</p> <p>15 other kinds of approval for -- later there were</p> <p>16 banks that just did their own mortgage-backed</p> <p>17 securities and not just where the mortgages were</p> <p>18 initially going to go to Fannie Mae or Freddie</p> <p>19 Mac, and I can explain the term if it's not clear.</p> <p>20 Fannie Mae is the federal national --</p> <p>21 Q. I'm good.</p> <p>22 A. So the -- so the software was configured so that</p> <p>23 there were a series of rules and variables that</p> <p>24 were to fit each region of the country and each</p> <p>25 type of loan. So we changed our architecture from</p>	<p style="text-align: right;">Page 25</p> <p>1 blue screens they wanted to have a different color</p> <p>2 screen. They could configure how they wanted the</p> <p>3 information entered in. They could configure how</p> <p>4 the calculations were done. So all this was</p> <p>5 open-ended, but what was really nice is that our</p> <p>6 users and financial institutions, law firms,</p> <p>7 escrow companies, title companies didn't have to</p> <p>8 be computer programmers. They could learn our</p> <p>9 system relatively easily, and they could configure</p> <p>10 and manage their own software.</p> <p>11 At our company, Blackacre, we could</p> <p>12 maintain one set of source code. So we obtained</p> <p>13 scale through one set of source code, we obtained</p> <p>14 scale through our distributors, and we obtained</p> <p>15 scale another way, which was we developed and were</p> <p>16 one of the earliest companies in developing direct</p> <p>17 marketing channels, including telemarketing,</p> <p>18 direct mail for particular products that fit</p> <p>19 certain areas.</p> <p>20 For example, in Texas, there was a law that</p> <p>21 the HUD 1 statement had to be done by closing</p> <p>22 attorneys, and hence that was a very big product,</p> <p>23 but a lot of the other product they didn't need in</p> <p>24 Texas. So we could have one set of source code</p> <p>25 with parameters and literally switches where we</p>



<p style="text-align: right;">Page 26</p> <p>1 could go in and give certain functionality, take 2 certain -- 3 MR. FLEMING: I'm going to object. What is 4 the question currently pending? 5 THE WITNESS: You're asking about the 6 software, what we did. Just cut me off. 7 MS. KLIEBENSTEIN: My question was about 8 the goods and services that Blackacre sells. 9 MR. FLEMING: Okay. Can you limit yourself 10 to that question? 11 THE WITNESS: I'm trying to, yeah, but I 12 asked her how long it was. I mean, I can talk 13 about Blackacre all day. It was such a fun 14 company. I really could. 15 So we developed these direct mail 16 telemarketing products that people could buy, put 17 in their computer, load up and run. So therefore, 18 we ran the full scope. 19 Then -- almost at the end of the products 20 we developed. Close actually. Then we had 21 several clients say, gee, we like your 22 flexibility, we want to do other stuff. So we 23 developed with their help foreclosure software, 24 and then we got into mortgage-backed security 25 software, buying and trading mortgage-backed</p>	<p style="text-align: right;">Page 28</p> <p>1 financial institutions, law firms, title 2 companies. Is there anybody else -- 3 A. The licensees. 4 Q. The licensees? 5 A. Including escrow companies. 6 Q. Escrow -- 7 A. Escrow companies, title companies, attorneys, 8 financial institutions, and then we had other law 9 firms that didn't do residential closings but they 10 used our software in other ways. 11 Q. Did you ever receive any feedback from those 12 licensees about the business benefits they 13 received from using that, that closing software? 14 A. Actually, yes, and we went further than that. 15 Q. And what was that feedback that you received on 16 the business benefits from that closing software? 17 A. We had taken the time to actually quantify the 18 benefits. In other words, not simply broad 19 statements but to quantify it. 20 Q. And what were the results of that quantification? 21 A. It depended on particular products. 22 Q. So I'm asking about -- well, why don't you give me 23 an example of one product on the quantification on 24 the business benefit that you did. 25 A. We developed technologies which enabled financial</p>
<p style="text-align: right;">Page 27</p> <p>1 securities because we worked with major financial 2 institutions, like Citibank. So we went the 3 entire soup to nuts process with real estate. 4 We got out of the origination business, the 5 mortgage origination software. It was just -- I 6 can explain why. It wasn't such a good business, 7 but this closing, the management, the 8 mortgage-backed securities, all the way through 9 was what we had when we exited the company. 10 BY MS. KLIEBENSTEIN: 11 Q. One clarification. So the software that would 12 allow the licensees to do their own customization 13 is that the mortgage processing origination 14 software? 15 A. It was the closing software. 16 Q. Oh. Yes. 17 A. And then it was the software used for 18 mortgage-backed security. 19 Q. Did it have a name? 20 A. It was Blackacre. 21 Q. It was just called Blackacre? 22 A. We had different iterations of Blackacre. 23 Q. Got it. So the -- the version of Blackacre for 24 the closings that allowed licensees to do their 25 own customization you said the customers were</p>	<p style="text-align: right;">Page 29</p> <p>1 institutions to have the documents produced for 2 closings and to communicate that using POTS, plain 3 old telephone service, to closing offices. This 4 eliminated or mitigated mistakes in the documents. 5 For example, changes in interest rates, spellings, 6 documents missing. 7 So when we would do pitches to financial 8 institutions, we would work through what the costs 9 were of errors where they would have to go and -- 10 and fix problems. Generally speaking as a rule of 11 thumb, to fix a problem in a closing after the 12 closing was about four to five times more 13 expensive than to fix the problem initially. That 14 was just as a rule of thumb. It depended on the 15 kind of transaction that was going on. So we had 16 those numbers. 17 We also had numbers -- it would depend, 18 again, on the product, but we took the time rather 19 to say broad brush -- and this was because -- we 20 sold licenses, and people often wanted that kind 21 of hard core data, this is how it would benefit us 22 in some ways. 23 That was my products at that time. I can't 24 say that every software company should do that, 25 could do that.</p>



<p style="text-align: right;">Page 30</p> <p>1 Q. So one example was fixing errors. Well, let me  2 ask about that example in particular, the data  3 about that it's four to five times more expensive  4 to fix the errors on the back end than the front  5 end. Did that come from customer feedback or  6 somewhere else?  7 MR. FLEMING: Objection. Foundation.  8 Time, place.  9 THE WITNESS: I think the way I phrased it  10 is incorrect. Could you please rephrase the  11 question?  12 MS. KLIEBENSTEIN: Sure.  13 BY MS. KLIEBENSTEIN:  14 Q. I'm wondering about the example that you just gave  15 me, the data underlying that example, did that  16 come from customer feedback, or somewhere else?  17 A. It came from customer feedback. It also came from  18 prospective customer feedback.  19 If you take a look at my CV, you'll see  20 that I developed courses, and also covered in my  21 courses, a commonly used term of making the  22 business case. So we would use data as well as  23 other information to make the business case to  24 justify the investment in our software.  25 Now, let me add, and this is critical, that</p>	<p style="text-align: right;">Page 32</p> <p>1 asset approach is not discussed in your report; is  2 that correct?  3 A. I was not asked to do the damages work in this  4 case, and let me add fair market is typically  5 defined in sort of again --  6 MR. FLEMING: Wait for the question.  7 THE WITNESS: I am. I am.  8 BY MS. KLIEBENSTEIN:  9 Q. That's not part of the --  10 A. Okay.  11 Q. That's not part of the question.  12 A. I was not asked to do damages.  13 Q. Thank you. All right. So for Blackacre, I  14 understand that -- that -- were assets sold to  15 McGraw-Hill? Did I get that right?  16 A. That's correct.  17 Q. And what assets exactly?  18 A. The software code, our client base, and the -- and  19 the contracts we had with licensees, clients to  20 pay ongoing maintenance.  21 So again, with the fair market being an  22 arm's length transaction between a willing buyer  23 and a willing seller, as part of the negotiations,  24 we considered the value of those assets, we  25 considered the income stream from, i.e., the</p>
<p style="text-align: right;">Page 31</p> <p>1 there is an enormous difference, enormous  2 difference between making the business case,  3 between talking about the benefits of our  4 software, and the fair market value of our  5 software that when you assess the fair market  6 value of our software -- and I went through this  7 in the negotiations with McGraw-Hill as well as  8 some other companies that were interested in  9 purchasing us, that you think about the market  10 approach, the income approach, the asset approach,  11 and that later led to me writing a peer reviewed  12 article on valuing software companies and software  13 products.  14 So that's an enormous difference. I want  15 to emphasize that, that the material you use when  16 you make a pitch or when people say we've gotten  17 benefits from your software is different than  18 you're actually evaluating the software.  19 Q. This fair market value approach, namely the market  20 approach, income approach, and asset approach --  21 A. The fair market value is --  22 MR. FLEMING: Wait. Wait for the question.  23 THE WITNESS: I'm sorry. My apologies.  24 BY MS. KLIEBENSTEIN:  25 Q. The market approach, the income approach, the</p>	<p style="text-align: right;">Page 33</p> <p>1 income approach, or discounted cash flow, and we  2 also considered the market approach with other  3 vertical markets software companies had sold for  4 using metrics like multiples of revenue, multiples  5 of net income, and other factors.  6 Q. Doctor Kursh, the -- I want to talk for a minute  7 if we can generality about the customers of  8 Blackacre and the types of licenses that they  9 purchased.  10 Can you describe for me at a 10,000 foot  11 level the types of licenses that the customers of  12 Blackacre would purchase? For example, I know in  13 this case we have enterprise application based,  14 but I want to understand for Blackacre what types  15 of licenses were involved.  16 A. I'll do the best I can in recalling, but as I  17 note, licensing has changed over time. I've  18 gained significant amount of licensing experience  19 after exiting Blackacre.  20 Q. Right, and my question --  21 A. I'm more familiar with other kinds of licenses  22 which will have different labels now and other  23 attributes, but focusing on Blackacre as best I  24 can recall, we did shrink wrap licenses, we did  25 negotiated licenses for -- again, when you think</p>



<p style="text-align: right;">Page 34</p> <p>1 about licensing and metrics, single use, single 2 computer, single offices. We did enterprise 3 licenses. We did sublicenses. For example, our 4 software was embedded in mortgage processing 5 systems as well. So it was like white label 6 licenses. Let's see what else we did. 7 We did licenses on the metrics of -- by 8 transactions. We did licenses based on different 9 kinds of hardware environments. We did licenses 10 that were fixed terms. We did unlimited licenses, 11 i.e., enterprise where we wouldn't do true-ups. 12 We did licenses, which were to some extent 13 where people would pay us a monthly fee, and they 14 would have uses, and there would be certain 15 limits. Again, each license, particularly with 16 enterprise was negotiated, and on the flip side, 17 we did licenses for some providers of technology 18 that we embedded in our software, and then we had 19 to do licenses with our licensees which linked 20 back to those original parties. In other words, 21 part of the agreement was whenever we sold a 22 license that used someone else's software, our 23 licensee had to sign an agreement as well, 24 flow-through. That's best as I can recall as I 25 sit here.</p>	<p style="text-align: right;">Page 36</p> <p>1 A. Well, again, you're talking about multiple years 2 in the business. As a rule of thumb, maintenance 3 fees would typically run anywhere from around 12 4 to 18 percent, which was consistent with practices 5 at that time, but there were some organizations, 6 for example, who would prefer because of their 7 accounting budgeting factors to bundle in the 8 initial license, particularly bundling the initial 9 license maintenance, and support, and updates. 10 Other people would negotiate and insist on clauses 11 like you couldn't raise it more than the Consumer 12 Price Index or some other index. 13 Q. Are these entities other than Blackacre? 14 A. These are Blackacre. 15 Q. Okay. All -- 16 A. Financial backed institutions. These were -- 17 these were Blackacre -- now, we had various 18 versions of Blackacre, but particularly at the 19 enterprise level, things got more complicated. 20 Things being licenses and other contracts between 21 the company and the licensees. 22 Q. At issue in this case is Blaze Advisor. What is 23 your understanding of how Blaze Advisor works? 24 A. I can speak only to Blaze Advisor in regard to 25 what I have learned from the materials in evidence</p>
<p style="text-align: right;">Page 35</p> <p>1 Q. On top of the license fees, were maintenance fees 2 also included in the licensing structure of 3 Blackacre? 4 A. Initially we would include those in one document, 5 but then we would split out the maintenance and 6 services. That came relatively early in the 7 process because the license we'll grant were 8 different, the rights granted, were different than 9 what the maintenance and service fees were. 10 We also would have agreements for updates, 11 and the kind of updates people would get would 12 vary. So -- and sometimes we would bundle the 13 updates with the maintenance and support, and we 14 had multiple versions of support similar to what 15 you see nowadays where you want a 2-hour response, 16 a 4-hour response, you're okay with 24-hour 17 response just as examples, and again, it really 18 depended on who the licensee was. 19 The financial institutions, law firms, 20 escrow companies that's a lot different than we 21 did shrink wrap licenses for products and people 22 buy it and just accept it. 23 Q. With respect to maintenance fees, service and 24 maintenance fees, how were those amounts 25 calculated?</p>	<p style="text-align: right;">Page 37</p> <p>1 in this case, as well as some general information 2 about Blaze Advisor relative to competitive 3 products in the marketplace, but I can't speak 4 about Blaze Advisor at other licensee sites other 5 than Federal. I don't know what Blaze Advisor 6 does at those other sites. 7 Q. Okay. So my question was: What is your 8 understanding of how Blaze Advisor operates? What 9 does it do? And we can put it in the context of 10 at Federal. 11 A. Define what you mean by operates. 12 Q. What are its functions at Federal? If you know. 13 A. It's my understanding that Blaze Advisor has 14 really two related components. One is the 15 technologies to enable the software, which is, for 16 want of a better term, a tool set, and that tool 17 set in my experience in working with other 18 rules-based software the tool set is just that, a 19 tool set that the value comes from, the processes, 20 the knowledge, the guidelines, the expertise of 21 the licensee. 22 That tool set is then configured or 23 customized to fit within the software used by the 24 licensee. Now, I've -- it's not -- and then this 25 -- which is for example there are visual tools</p>



<p style="text-align: right;">Page 38</p> <p>1 where particularly it's my understanding that</p> <p>2 employees or -- and/or consultants, contractors</p> <p>3 associated with FICO implement the Blaze software</p> <p>4 as they did at Federal.</p> <p>5 Once that's implemented, the engine of</p> <p>6 Blaze Advisor is used with -- in coordination with</p> <p>7 the software at Federal. That's the best I can</p> <p>8 say at this moment.</p> <p>9 If you give me more time, I can think about</p> <p>10 more.</p> <p>11 Q. Have you -- have you seen a demonstration or</p> <p>12 interacted with any of the applications at Federal</p> <p>13 that use Blaze Advisor?</p> <p>14 A. No.</p> <p>15 Q. Have you reviewed the -- you mentioned the</p> <p>16 processes, the knowledge, the guidelines, the</p> <p>17 expertise. Have you reviewed any -- have you</p> <p>18 reviewed any of the rules that Federal has put</p> <p>19 into Blaze Advisor?</p> <p>20 A. No.</p> <p>21 Q. What is your experience in the insurance industry?</p> <p>22 A. Excuse me also. It's my understanding, again, I</p> <p>23 don't know -- I only know what -- based on the</p> <p>24 evidence on this case. In terms of the actual</p> <p>25 implementation project, I know that Federal paid</p>	<p style="text-align: right;">Page 40</p> <p>1 Blackacre with title insurance companies. For</p> <p>2 example, First American Title Insurance,</p> <p>3 Commonwealth Title Insurance, which are large</p> <p>4 organizations. I've worked with -- when we work</p> <p>5 with financial institutions and mortgage-backed</p> <p>6 securities, when you're assessing the risk of a</p> <p>7 loan portfolio and the pricing of what is going to</p> <p>8 be charged to the borrower for mortgage insurance,</p> <p>9 for example, some of the work we did at Citibank.</p> <p>10 I've worked with Hartford Insurance as a</p> <p>11 consultant. I've worked with Liberty Mutual</p> <p>12 Insurance as a consultant.</p> <p>13 Liberty Mutual does -- they are one of the</p> <p>14 nation's largest insurance companies, of course,</p> <p>15 with the acquisition of Safeco several years ago.</p> <p>16 I've worked with graduate students in my courses</p> <p>17 who have worked at insurance companies, John</p> <p>18 Hancock for example, Noah Life for example, and we</p> <p>19 have talked and they have done projects related to</p> <p>20 the insurance industry.</p> <p>21 More recently I've worked with -- in the</p> <p>22 areas of Insurtech, the implementation of</p> <p>23 different business models and technologies in the</p> <p>24 insurance industry, for example, the pricing of</p> <p>25 insurance policies based on use, for example, car</p>
<p style="text-align: right;">Page 39</p> <p>1 millions of dollars to FICO to have people</p> <p>2 associated with FICO take those -- take that</p> <p>3 knowledge, take those processes that Federal has</p> <p>4 to implement them into the Federal software with</p> <p>5 Blaze Advisor. So that work from my understanding</p> <p>6 was done primarily by FICO, or people associated</p> <p>7 with FICO.</p> <p>8 Your question said is it Federal did it,</p> <p>9 and it's my understanding, again, that at least</p> <p>10 based on the numbers I've seen, but I have not</p> <p>11 studied this because it's not within the scope of</p> <p>12 my work, the numbers I've seen that most of that</p> <p>13 work was done by FICO or people associated with</p> <p>14 FICO.</p> <p>15 Q. The last question I asked is what -- what is your</p> <p>16 experience in the insurance industry specifically?</p> <p>17 A. Define insurance industry please.</p> <p>18 Q. I won't. The question stands. What is your</p> <p>19 experience in the insurance industry? I think</p> <p>20 that phrase is pretty self-explanatory,</p> <p>21 particularly in this case.</p> <p>22 A. I've worked in one form or another in my career</p> <p>23 with a variety of entities involved with</p> <p>24 insurance.</p> <p>25 We've talked already about my work at</p>	<p style="text-align: right;">Page 41</p> <p>1 insurance that would be priced each time you use</p> <p>2 your car rather than what we generally have now</p> <p>3 where we pay monthly, quarterly, semiannual, or</p> <p>4 annual premium.</p> <p>5 I've worked on insurance for Prudential. I</p> <p>6 was in their Newark office. That's all I can</p> <p>7 recall as I sit here. There will be other</p> <p>8 examples as well.</p> <p>9 Q. For Prudential, were you offering consulting</p> <p>10 services?</p> <p>11 A. Correct.</p> <p>12 Q. What type of consulting?</p> <p>13 A. It related to their back-end technology systems</p> <p>14 and the -- how they managed their portfolios.</p> <p>15 Developing technologies that would assist them</p> <p>16 with REO, real estate owned, and having it work</p> <p>17 with their existing computer systems.</p> <p>18 Q. And when was this?</p> <p>19 A. This would have been, as best I can recall,</p> <p>20 somewhere 2000 -- I remember it was before I went</p> <p>21 on the Fulbright. So it would be about 2003-2004.</p> <p>22 Q. And Liberty Mutual; what type of consulting were</p> <p>23 you doing for Liberty Mutual?</p> <p>24 A. I've done a variety of consulting for Liberty</p> <p>25 Mutual. I have taught courses on risk assessment.</p>



<p style="text-align: right;">Page 42</p> <p>1 I have taught courses on project management. I</p> <p>2 have worked with them on the technology side in</p> <p>3 terms of some of their software products.</p> <p>4 Q. And what were the dates of these consulting --</p> <p>5 consulting arrangements?</p> <p>6 A. Most of that would have occurred in the last ten</p> <p>7 years. Although I have worked with Liberty Mutual</p> <p>8 previous to that, but mostly it would be in the</p> <p>9 last ten years.</p> <p>10 Q. And finally, the Hartford; what type of consulting</p> <p>11 did you provide to the Hartford?</p> <p>12 A. I did courses for them, risk management, software</p> <p>13 project management, scheduling, and cost control.</p> <p>14 That's best I can recall as I sit here.</p> <p>15 Q. And when did that consulting take place?</p> <p>16 A. Probably the last 15 years. Somewhere around</p> <p>17 '06-07. So it would be 12 years. Somewhere in</p> <p>18 there. I don't recall as I sit here. Somewhere</p> <p>19 in that time period.</p> <p>20 MR. FLEMING: Could we take a short break?</p> <p>21 MS. KLIEBENSTEIN: Yeah.</p> <p>22 THE VIDEOGRAPHER: We are going off the</p> <p>23 10:38 23 record. The time now is a.m.</p> <p>24 (Whereupon a short break was taken from</p> <p>25 10:38 25 a.m. to 10:50 a.m.)</p>	<p style="text-align: right;">Page 44</p> <p>1 them. Typically -- okay.</p> <p>2 Q. For the cases that are listed in your CV, how many</p> <p>3 of these involved cases for breach of a software</p> <p>4 license agreement?</p> <p>5 A. Every single one of the cases listed relates to</p> <p>6 software, and so again, the name of my company,</p> <p>7 Software Analysis Group, it's software.</p> <p>8 As to your term, your definition, breach of</p> <p>9 a license agreement, most of the cases are either</p> <p>10 contract disputes or related to IP, and in some of</p> <p>11 the IP matters, there is a license involved, but</p> <p>12 the license involved is peripheral to a trade</p> <p>13 secret case, software implementation case. I --</p> <p>14 that's the best I can answer as I sit here at the</p> <p>15 moment.</p> <p>16 Q. Can you run down the list in your CV and tell me</p> <p>17 -- identify for me which cases are contract</p> <p>18 disputes where one of the parties has a claim for</p> <p>19 breach of contract?</p> <p>20 A. The first case, HealthEdge Software, was a</p> <p>21 software implementation of the TML Multistate IEBP</p> <p>22 license software, was Cloud based, and as you may</p> <p>23 have seen my CV, I have done research on Cloud</p> <p>24 software, testing Cloud software, and this is a --</p> <p>25 related to the implementation of the software. So</p>
<p style="text-align: right;">Page 43</p> <p>1 THE VIDEOGRAPHER: We are back on the</p> <p>2 record. This marks the beginning of Media 2 in</p> <p>3 the deposition of Steven Kursh. The time now is</p> <p>4 10:51 4 a.m.</p> <p>5 BY MS. KLIEBENSTEIN:</p> <p>6 Q. Doctor Kursh, I'd like to turn to your CV, Page</p> <p>7 11, and I want to talk about your previous expert</p> <p>8 witness testimony.</p> <p>9 There are a number of cases listed under</p> <p>10 the heading Expert Witness Testimony. Are these</p> <p>11 all of the cases in which you have provided an</p> <p>12 expert report in the last four years?</p> <p>13 A. The listing on the CV is consistent with what I</p> <p>14 understand to be disclosures for expert witnesses,</p> <p>15 i.e., declarations, depositions, and trial or</p> <p>16 arbitration testimony. I have also done reports</p> <p>17 in litigation matters that are not listed here.</p> <p>18 Q. And are those reports that are not listed on here</p> <p>19 are those reports supporting expert witness --</p> <p>20 anticipated expert witness testimony?</p> <p>21 A. Some of the reports I had been retained as a</p> <p>22 consultant, and at that particular time not an</p> <p>23 expert witness. As to whether or not counsel and</p> <p>24 a client choose or did choose to retain me as an</p> <p>25 expert witness, that you would have to speak with</p>	<p style="text-align: right;">Page 45</p> <p>1 there was a contract, or contracts licenses as</p> <p>2 well as other contracts.</p> <p>3 The second case, Toys R Us, was a</p> <p>4 bankruptcy case of my work related to agreements,</p> <p>5 contracts between Toys R Us and its divisions.</p> <p>6 Toys R Us had a central IT services that they</p> <p>7 provided to their divisions, includes Toys R Us</p> <p>8 Asia, and it -- this case also relates to</p> <p>9 copyrights, and ownership rights in the software,</p> <p>10 as well as other factors.</p> <p>11 ARMOUR Capital Management you're certainly</p> <p>12 familiar with since Mr. Hilliyyer is in the</p> <p>13 opposition of in case.</p> <p>14 Mastil, Campbell, Macfarlane is a --</p> <p>15 management of a software company, and some of the</p> <p>16 contracts among the parties, along with other</p> <p>17 factors. I'm doing my best to summarize it.</p> <p>18 Again, I'm not a lawyer. You'll have to -- when</p> <p>19 you do the LexisNexis search, or Westlaw,</p> <p>20 whatever, you'll get more detail.</p> <p>21 LivePerson is a -- a trade secret matter.</p> <p>22 Q. And Doctor Kursh, if I could interrupt, what I'm</p> <p>23 looking for is I don't want to talk about every</p> <p>24 one of these cases. I just want to understand</p> <p>25 which are similar to the case we have at hand</p>



<p style="text-align: right;">Page 46</p> <p>1 where we have a breach of contract claim involving</p> <p>2 a software license agreement.</p> <p>3 If you could just identify those cases for</p> <p>4 me.</p> <p>5 MR. FLEMING: The cases that involve breach</p> <p>6 of contract you're saying?</p> <p>7 MS. KLIEBENSTEIN: Involving a software</p> <p>8 license agreement. That's right.</p> <p>9 THE WITNESS: I want to be careful in your</p> <p>10 seeking comparison of cases between cases like --</p> <p>11 MR. FLEMING: Doctor Kursh, the question</p> <p>12 she asked -- she originally asked you something</p> <p>13 about similar cases, but the question she's</p> <p>14 asking --</p> <p>15 MS. KLIEBENSTEIN: Terry, how about I ask</p> <p>16 it again.</p> <p>17 MR. FLEMING: Yeah. Okay. I appreciate</p> <p>18 that.</p> <p>19 THE WITNESS: Thank you.</p> <p>20 BY MS. KLIEBENSTEIN:</p> <p>21 Q. My question is: Which of the cases listed under</p> <p>22 the expert testimony heading which of those cases</p> <p>23 involve a claim of breach of contract of a</p> <p>24 software license agreement?</p> <p>25 A. I don't know -- as I sit here at the moment, I</p>	<p style="text-align: right;">Page 48</p> <p>1 A. What do you mean by served as an expert witness?</p> <p>2 Do you mean writing a report? Doing research?</p> <p>3 Being deposed? Filing -- filing with PTAB?</p> <p>4 Appearing in trial? So please be more specific</p> <p>5 with your question.</p> <p>6 Q. How about the number of times where similar to</p> <p>7 this case you have issued a report in the matter</p> <p>8 prior to deposition, prior to trial testimony;</p> <p>9 issued a report as a testifying expert witness?</p> <p>10 A. This case in -- as I noted earlier, contract</p> <p>11 dispute --</p> <p>12 Q. Let me ask it again. Sorry. I apologize. How</p> <p>13 many times have you issued a report as a</p> <p>14 testifying expert witness in your career?</p> <p>15 A. I don't know the exact number. It would probably</p> <p>16 be close to 60 or 75. Somewhere in that range. I</p> <p>17 don't recall as I sit here.</p> <p>18 Q. Over --</p> <p>19 A. I mean, I just don't -- I haven't done the</p> <p>20 counting so I don't recall. I haven't done the</p> <p>21 counting.</p> <p>22 Q. Sure, and over how many years does that -- does</p> <p>23 that experience span?</p> <p>24 A. I've been doing this kind of work for about --</p> <p>25 almost 16 years or so.</p>
<p style="text-align: right;">Page 47</p> <p>1 don't recall. For example, in the LivePerson</p> <p>2 case, there was a contract between the parties but</p> <p>3 was -- as I best I can recall when I sit here was</p> <p>4 not a software license agreement. It was an</p> <p>5 agreement that one company would provide services</p> <p>6 to the other company. So it was a breach of</p> <p>7 contract and a trade secret matter, but there was</p> <p>8 not a software license agreement as best I can</p> <p>9 recall.</p> <p>10 So I'll do my best in responding, but I</p> <p>11 don't -- I don't recall as I sit here.</p> <p>12 Vertex, Bottomline Technologies. That was</p> <p>13 as best I recall -- and I may be wrong again. I</p> <p>14 don't recall as I sit here. That was a breach of</p> <p>15 a contract, and it did involve software. All of</p> <p>16 these involve software one way or another, but --</p> <p>17 with the exception of DeSouza, which is indirectly</p> <p>18 software. We can talk about that if you like.</p> <p>19 The -- so I don't know if there's sort of a</p> <p>20 software license agreement like what we see in</p> <p>21 this matter. So that's why I'm trying to</p> <p>22 understand better your question and respond fully</p> <p>23 to your question.</p> <p>24 Q. How many times have you served as an expert</p> <p>25 witness in a lawsuit Doctor Kursh?</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. And has your testimony ever been excluded by a</p> <p>2 court?</p> <p>3 A. I've had, as best I can recall, a situation where</p> <p>4 my testimony was -- a Daubert was filed in a case,</p> <p>5 again, on a Daubert filed against me and a Daubert</p> <p>6 filed against the expert for the other side, and</p> <p>7 the judge in the case ruled that I could testify</p> <p>8 regarding -- this was a licensing case. This was</p> <p>9 a specific licensing case, not licensing -- it's</p> <p>10 just a licensing case, and there I was going to</p> <p>11 testify regarding a technical term of the meaning</p> <p>12 of CPUs, and opposing counsel was concerned I</p> <p>13 would testify as to what was on the minds of the</p> <p>14 parties when they negotiated the arrangement or</p> <p>15 contract, which I would not do, and the judge</p> <p>16 allowed I could testify, both of us, myself and</p> <p>17 the other expert, on technical issues.</p> <p>18 Q. Do you recall what case was that?</p> <p>19 A. Actuate software.</p> <p>20 (Whereupon material was marked for</p> <p>21 identification as Exhibit 514.)</p> <p>22 BY MS. KLIEBENSTEIN:</p> <p>23 Q. I'm handing you what's been marked as Exhibit 514.</p> <p>24 (Whereupon material was marked for</p> <p>25 identification as Exhibit 515.)</p>



<p style="text-align: right;">Page 50</p> <p>1 BY MS. KLIEBENSTEIN:</p> <p>2 Q. I'll hand you what has been marked as Exhibit 515</p> <p>3 as well. Doctor Kursh, if you could talk about</p> <p>4 Exhibit 514, and then we'll look at 515.</p> <p>5 A. Sure.</p> <p>6 Q. Have you seen Exhibit 514 before?</p> <p>7 A. Several years ago.</p> <p>8 Q. And is this the court's order that you referred to</p> <p>9 regarding the -- the instance in which your</p> <p>10 testimony was excluded?</p> <p>11 A. My testimony was not excluded. Portions of my</p> <p>12 testimony, potential testimony would have been</p> <p>13 excluded.</p> <p>14 Q. And I'm turning to Page 3, and looking in the</p> <p>15 first full paragraph on the right-hand column, the</p> <p>16 court wrote, "However even though Doctor Kursh is</p> <p>17 qualified to testify about industry custom, for</p> <p>18 reasons discussed, he will be limited on direct</p> <p>19 examination to testimony about custom and practice</p> <p>20 in the software industry and likely be precluded</p> <p>21 from testifying about the particular contracts and</p> <p>22 conduct at issue in this action."</p> <p>23 Is -- is that the portion of the judge's</p> <p>24 order which you referred to regarding the partial</p> <p>25 exclusion?</p>	<p style="text-align: right;">Page 52</p> <p>1 itself.</p> <p>2 BY MS. KLIEBENSTEIN:</p> <p>3 Q. You were motioning to Exhibit 515. Is this -- is</p> <p>4 Exhibit 515 the report that you submitted in the</p> <p>5 Actuate versus Aon matter?</p> <p>6 A. Yes. That looks to be -- again, I'm trusting you</p> <p>7 that it is.</p> <p>8 Q. Well, I don't know one way or the other.</p> <p>9 MS. KLIEBENSTEIN: Yes?</p> <p>10 MR. FLEMING: I was going to tell him to</p> <p>11 wait for the question.</p> <p>12 BY MS. KLIEBENSTEIN:</p> <p>13 Q. I would ask you to look at this report and confirm</p> <p>14 this is the report that you submitted in that</p> <p>15 Actuate matter, and I'll represent that it was</p> <p>16 found on Pacer, the court's docket system.</p> <p>17 A. I've done a quick review of the report I filed in</p> <p>18 this matter, in the Actuate versus Aon</p> <p>19 Corporation.</p> <p>20 Q. And you can confirm this is the report that you</p> <p>21 filed in that matter?</p> <p>22 A. I don't have a copy of the report, but I assume --</p> <p>23 again, based that you said that you got it from</p> <p>24 Pacer, I assume that it is the report.</p> <p>25 Q. And did you end up testifying in trial in this</p>
<p style="text-align: right;">Page 51</p> <p>1 A. Yes.</p> <p>2 Q. And do you have any understanding of what a --</p> <p>3 what the phrase -- do you have an understanding of</p> <p>4 what the phrase 'testimony about the particular</p> <p>5 contracts' referred to? What was the judge</p> <p>6 referring to when he or she wrote this?</p> <p>7 MR. FLEMING: Objection. Lack of</p> <p>8 foundation.</p> <p>9 THE WITNESS: May I answer?</p> <p>10 MR. FLEMING: Yes.</p> <p>11 THE WITNESS: There were license agreements</p> <p>12 in this case that, as best I can recall, again,</p> <p>13 this case over five years ago, actually over seven</p> <p>14 years ago. The -- there was a license agreement</p> <p>15 between Actuate and Aon. There was another</p> <p>16 agreement as well as best I can recall.</p> <p>17 BY MS. KLIEBENSTEIN:</p> <p>18 Q. And what was it about the contracts that you could</p> <p>19 not testify about?</p> <p>20 MR. FLEMING: Objection. Lack of</p> <p>21 foundation, and vague.</p> <p>22 THE WITNESS: I would have to read my</p> <p>23 report, and I would have to read the judge's</p> <p>24 opinion. I don't recall as I sit here, but again,</p> <p>25 it was the -- the judge's opinion speaks for</p>	<p style="text-align: right;">Page 53</p> <p>1 matter?</p> <p>2 A. No.</p> <p>3 Q. I'd like --</p> <p>4 A. The parties settled.</p> <p>5 Q. I'd like to turn to Page 8.</p> <p>6 A. Of which document?</p> <p>7 Q. Exhibit 515 please, and starting at Paragraph 28,</p> <p>8 I see a listing of the summary of your findings;</p> <p>9 is that accurate?</p> <p>10 A. Yes.</p> <p>11 Q. From 28 through 36; correct?</p> <p>12 A. Yes.</p> <p>13 Q. And do you know, based on the court's order in</p> <p>14 Exhibit 514, which of your findings you were</p> <p>15 allowed to -- you would be allowed to testify</p> <p>16 about, and which you were not?</p> <p>17 MR. FLEMING: Object. Lack of foundation.</p> <p>18 THE WITNESS: The court's order said I can</p> <p>19 talk about customs and practices in the software</p> <p>20 industry, and I would -- and likely -- be likely</p> <p>21 -- be precluded from testimony about the</p> <p>22 particular contracts and conduct at issue in this</p> <p>23 action. So I could talk about customs and</p> <p>24 practices, and likely be precluded.</p> <p>25 So with regard to my findings, they are</p>



<p style="text-align: right;">Page 54</p> <p>1 based on customs and practices in the industry,  2 and never testified in court in this case, the  3 parties settled, and again, Judge Alsup is --  4 self-explanatory. I would likely be precluded  5 from testimony about certain issues, but I'd be  6 fine testifying about customs and practices in the  7 industry.  8 BY MS. KLIEBENSTEIN:  9 Q. What in your mind is the difference between an  10 opinion about custom and practice in the software  11 industry versus an opinion about a conduct at  12 issue in the lawsuit?  13 A. There is --  14 MR. FLEMING: Same objection. Lack of  15 foundation.  16 THE WITNESS: The issue as to customs and  17 practices are, as we look at the evidence in a  18 particular matter, we consider that evidence in  19 the context of customs and practices in the  20 software industry.  21 Hence, for example, a customs and practices  22 could be issues relating to management, marketing,  23 compensation, licensing, which broadly includes  24 compliance, software development policies, along  25 with other factors. So we consider the evidence</p>	<p style="text-align: right;">Page 56</p> <p>1 as we get into your report.  2 BY MS. KLIEBENSTEIN:  3 Q. All right. Coming back to 513, which is your  4 report, let's turn to Paragraph 47. So Paragraphs  5 47 through had 54, these paragraphs are an  6 overview of the software industry; correct?  7 A. In the context of this report, I or many other  8 people qualified to do so could write a book about  9 the software industry, but with respect to this  10 particular report, it provides an overview.  11 Q. And my question is: Why did you include  12 Paragraphs 47 through 54 in this report?  13 A. Paragraphs 47 through 54 are part of an overall  14 section, Roman Numeral V, introduction to the  15 software industry. Should this matter proceed to  16 trial, I have found in the past that while I and  17 many of the other people involved in litigation  18 matters live their lives professionally in the  19 software industry the general public, as well as  20 others, don't, and consequently this paragraph --  21 all of this entire section is in the report so  22 that if appropriate and needed I can provide  23 background about the software industry during the  24 trial.  25 It's my understanding if it's not in your</p>
<p style="text-align: right;">Page 55</p> <p>1 in the context of the customs and practices in the  2 industry.  3 Then with respect to the conduct, we can  4 review that conduct relative to customs and  5 practices as well as particular technical terms,  6 like CPU processors, which was a critical issue in  7 the Actuate case, the difference between core and  8 processors, hence that's my first finding, and  9 then we consider the actions of the parties within  10 the context of customs and practices as to whether  11 or not those actions, i.e. you, do not -- the  12 trier of fact benefits from an expert providing  13 context in regard to the actions taken, but the  14 trier of fact ultimately makes the decision  15 regarding those actions taken.  16 BY MS. KLIEBENSTEIN:  17 Q. So with regard to actions taken in a breach of  18 contract case, is it your opinion that an expert  19 can provide context to those actions? Is that  20 what I'm hearing you say?  21 MR. FLEMING: Objection. Outside of the  22 scope of his expert opinion.  23 THE WITNESS: I don't understand your  24 question.  25 MS. KLIEBENSTEIN: Let's just flesh it out</p>	<p style="text-align: right;">Page 57</p> <p>1 report and not discussed you can't testify to it  2 at the trial.  3 Q. Let's move to Paragraph 58, and the heading is --  4 is titled Enterprise Software Agreements and Other  5 Contracts, and underneath it, you refer to two  6 customary practices, discounts and negotiation.  7 My question is: Those two customary practices --  8 I'm a little confused by the heading. Are those  9 two customary practices in the enterprise software  10 license agreement industry or another industry?  11 A. I don't understand your question. I can't speak  12 for all other industries. Although I have some  13 experiences in other industries, I speak, again,  14 in my professional life in the software industry.  15 Q. I'll ask it a different way.  16 A. Sure.  17 Q. The two practices you mention in this section,  18 negotiation and discounts, are those -- are you  19 saying in your report that those are two customary  20 practices in the enterprise software license  21 agreement industry?  22 A. They are two customary practices in software  23 licensing specifically in regard to enterprise  24 software licenses.  25 Q. Why in your report did you highlight these two</p>



<p style="text-align: right;">Page 58</p> <p>1 practices instead of others?</p> <p>2 A. For the same reason that I provided earlier when</p> <p>3 you asked about Paragraphs 47 through 54. I have</p> <p>4 found it helpful to provide context and</p> <p>5 information to the trier of fact, again, for</p> <p>6 people who are involved in the software industry,</p> <p>7 much of what I have written may well be well of</p> <p>8 course in their minds, but many people who do not</p> <p>9 spend their professional lives in the software</p> <p>10 industry may benefit from that information, and I</p> <p>11 wanted to put it into the report so, again, if</p> <p>12 appropriate, I could testify to it at trial.</p> <p>13 As I noted earlier, it is my understanding</p> <p>14 that unless an expert discusses an issue in her or</p> <p>15 his report they cannot testify to it at trial.</p> <p>16 Q. Looking at Paragraph 60 --</p> <p>17 A. I'm sorry. Paragraph?</p> <p>18 Q. 60, you wrote, "The word discount is a misnomer in</p> <p>19 this context because generally no licensee pays</p> <p>20 whatever the claimed list price is for a certain</p> <p>21 software product."</p> <p>22 What is your support for that statement?</p> <p>23 A. I can provide three specific examples of support</p> <p>24 for the statement. As I sit here, I can provide</p> <p>25 more given additional time.</p>	<p style="text-align: right;">Page 60</p> <p>1 software implementation, or even an IP lawsuit,</p> <p>2 I'm looking at licenses specifically from the</p> <p>3 perspective of industry customs and practices in</p> <p>4 the software licensing. There's a difference</p> <p>5 there.</p> <p>6 I've done a lot of both, but with respect</p> <p>7 to the licensing issue, I did a matter of --</p> <p>8 involving AVIA with respect to the rights granted</p> <p>9 and the pricing. I did a matter behalf of Epicore</p> <p>10 with respect to the rights and license granted</p> <p>11 with distribution. Epicore is a publicly traded</p> <p>12 software company.</p> <p>13 I have done one with Oracle in opposition</p> <p>14 with Oracle pricing, as well as other issues. I</p> <p>15 have done other litigation matters that have</p> <p>16 related specifically to customs and practices in</p> <p>17 software licensing.</p> <p>18 Again, that's separate from trying to say</p> <p>19 that someone does work in licensing, she or he</p> <p>20 does work in licensing, as part of a software</p> <p>21 implementation, which I've done too, but again,</p> <p>22 focusing on licensing. So I do this based on my</p> <p>23 knowledge, training, and experience not just in</p> <p>24 building and managing software companies but as a</p> <p>25 management consultant, example, Intermountain</p>
<p style="text-align: right;">Page 59</p> <p>1 One is that based on my experience in the</p> <p>2 industry working with enterprise software</p> <p>3 licenses, and this is experience not simply at</p> <p>4 Blackacre working with enterprises like Citibank,</p> <p>5 Bank of America, and other enterprises, and I'm</p> <p>6 not talking about licenses for small and midsize</p> <p>7 businesses, although we did do that too, based on</p> <p>8 my experience as a consultant, my experience as an</p> <p>9 expert witness, enterprise license agreements are</p> <p>10 negotiated.</p> <p>11 For example, I assisted as a consultant to</p> <p>12 Intermountain Healthcare, which is a large</p> <p>13 hospital chain in the mountain states. I assisted</p> <p>14 them in negotiating a software license agreement.</p> <p>15 Obviously part of that agreement is on pricing,</p> <p>16 the pricing relative to the rights and the metrics</p> <p>17 used with respect to the rights granted. That's</p> <p>18 one example; my knowledge, training, skills, and</p> <p>19 experience.</p> <p>20 Additionally with respect to my knowledge,</p> <p>21 skills, training, and experience, this is, again,</p> <p>22 in Category 1, I've been engaged in numerous</p> <p>23 expert witness matters involving software pricing</p> <p>24 and rights, and I want to emphasize the difference</p> <p>25 between looking at licenses with respect to a</p>	<p style="text-align: right;">Page 61</p> <p>1 Health, as well as an expert witness.</p> <p>2 Second category to substantiate this. I</p> <p>3 cite a reference here from one article. You could</p> <p>4 also for example go to Gartner, which is a</p> <p>5 publicly traded IT related firm, and you will find</p> <p>6 articles and materials there supporting the notion</p> <p>7 of the idea of very few enterprises, if at all,</p> <p>8 pay list price. I can't say they all. You may</p> <p>9 have a CIO or CEO and she or he just signs off and</p> <p>10 there would be other issues involved, but</p> <p>11 generally speaking, what I say in Paragraph 60 is</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 So in combination of those three, my</p> <p>24 knowledge, training, and experience, and I give</p> <p>25 you examples of how I got some of that, there's</p>



<p style="text-align: right;">Page 62</p> <p>1 much more we can talk about, for example, in  2 courses that I taught where I'm talking about  3 software licensing pricing. Second is there are  4 numerous independent third party sources, and  5 third, with respect to the evidence in this case,  6 we have a specific example of it with FICO and  7 Oracle, and then tied in with that, we also see  8 with FICO's own pricing, which I discuss in my  9 report, there's a section with the discounts that  10 FICO provides, and let's take a look at this case.  11 I'll reference you to Pages 19 and 20,  12 which provide FICO's business unit pricing  13 guidelines, Exhibit 2 is FICO's cumulative net  14 license, and yet even with all of that, we know  15 and I cite this in Paragraph 68, that FICO sold  16 the original enterprise license agreement for  17 [REDACTED] So FICO's actions  18 are consistent with the industry in that regard.  19 Q. So you referenced FICO versus -- FICO and Oracle?  20 A. Correct.  21 Q. And is that an agreement that you looked at in  22 this case?  23 A. I looked at some materials relating to the  24 FICO-Oracle litigation.  25 Q. Okay, and is that -- let's look --</p>	<p style="text-align: right;">Page 64</p> <p>1 not quoted in the article.  2 Based on the inverse of elasticity rule,  3 customers not price sensitive will pay higher  4 prices facing only two alternatives rather than  5 three. So that's where the 20 to 90 percent comes  6 from, but as I emphasized when I responded to this  7 specific question, I have multiple bases for my  8 opinions that I provide in Paragraph 60 in my  9 report.  10 Q. And do you know Doctor Elzinga?  11 A. I do not.  12 Q. Do you know what his expertise is?  13 A. With respect to that matter, it would likely be  14 the software industry.  15 Q. Do you know what his evidence for -- what his  16 evidence is to say that discounts range from 20  17 percent to 90 percent?  18 A. Well, it states in Paragraph -- first, first  19 paragraph on Page 3, the author writes -- let's go  20 back to the last paragraph on Page 2, "Deep  21 discounting a-go-go." Last sentence, "Few  22 organizations are paying sticker price for RDMBM,"  23 that's relational database management systems,  24 from Microsoft, Oracle, IBM, or CyBase.  25 One proof on the top of Page 3 question</p>
<p style="text-align: right;">Page 63</p> <p>1 A. I can give you other examples if you'd like.  2 Q. Let's look at the article referenced in Footnote  3 12, and I believe that's attached to your report;  4 correct?  5 A. Yes.  6 Q. Can you point me to where in your article it  7 discusses a range of discounts between 20 to 90  8 percent?  9 A. I don't know if that specific language is in the  10 article. The article is just one support, one  11 factor supporting the opinion I reached. I just  12 provided you multiple other factors. So let me  13 reread the article.  14 In fact, Paragraph 1 states, "How about the  15 fact that Oracle, long viewed as a tough bargainer  16 when it comes to application and database pricing  17 was practically giving its software away to some  18 large accounts with discounts up to 90 percent."  19 If you turn please to Page 3 of that  20 article, Paragraph 3, quote, this is the expert in  21 -- one of the experts in that case, "There is so  22 much price discrimination in this market." Doctor  23 Elzinga told the court, "Discounts range from more  24 than 20 percent to as much as 90 percent ..."  25 i.e., there's sections of his testimony which were</p>	<p style="text-align: right;">Page 65</p> <p>1 mark, "In testimony in the Justice Department's  2 effort to forestall Oracle's acquisition of  3 PeopleSoft, University of Virginia economics  4 professor and antitrust luminary, Doctor Kenneth  5 Elzinga, disclosed that Oracle, among with some of  6 its competitors in the enterprise application  7 space aren't adverse to offering customers,  8 particularly large accounts, staggering  9 discounts," and I will -- again, this is just one  10 opinion from my own experience in the industry  11 what Doctor Elzinga testified to is absolutely  12 correct.  13 I have personally in my work as a  14 management consultant expert witness reviewed at  15 least 3 to 400 different licensing agreements for  16 enterprises. At least.  17 Q. Doctor Kursh, let's stick with the question.  18 A. Let me finish. Let me finish. Actually, one case  19 I'm doing -- I'm down to 200 so we're talking 600,  20 and in those you see this kind of discounting.  21 Q. Doctor Kursh, I absolutely want to let you finish  22 today, and I understand you have a lot of  23 experience over the years, and so I understand  24 that -- that you want to add more, but at the same  25 time, I have the right to ask my question and get</p>



<p style="text-align: right;">Page 66</p> <p>1 a specific answer within the bounds of that</p> <p>2 question.</p> <p>3 I don't want to have a day where -- where I</p> <p>4 jump in to -- to cut you off. That just -- that</p> <p>5 makes for an uncomfortable day, but if I have to,</p> <p>6 I will. So I'm going to ask you going forward to</p> <p>7 just listen to the question, provide a response,</p> <p>8 and then we'll move on to the next question. If</p> <p>9 there's something you don't understand about what</p> <p>10 I'm asking you, I'll ask it again, but let's --</p> <p>11 let's just say within those four corners so that</p> <p>12 we can get out of here in seven hours.</p> <p>13 So back to the article, do you know if</p> <p>14 Doctor Elzinga's testimony was adopted by the</p> <p>15 court in the Justice Department's antitrust case?</p> <p>16 A. I do not.</p> <p>17 Q. And who is Steven Swoyer, the author of this</p> <p>18 article?</p> <p>19 A. If you look at the last page, it states that he is</p> <p>20 a journalist about technology.</p> <p>21 Q. And do you know him?</p> <p>22 A. I do not.</p> <p>23 Q. Do you know if he is qualified to be an expert in</p> <p>24 the software licensing industry?</p> <p>25 A. I -- I don't know him. He's not being an expert</p>	<p style="text-align: right;">Page 68</p> <p>1 licensee presents an opportunity to keep the</p> <p>2 software companies "bench" of consultants who do</p> <p>3 customization and configuration work occupied and</p> <p>4 billing time."</p> <p>5 Other examples are, and I discuss this in</p> <p>6 my report elsewhere, the nature of the</p> <p>7 relationship, whether it's a referenceable</p> <p>8 account, whether or not there are other benefits</p> <p>9 the licensor sees. For example, discounts because</p> <p>10 it's a beta test version of the software. Those</p> <p>11 are just some examples. I can provide more if</p> <p>12 you'd like.</p> <p>13 Q. Your report references circumstances with license</p> <p>14 fees near zero or zero. Within the confines of</p> <p>15 your report, what is your support for that</p> <p>16 statement?</p> <p>17 A. If you turn please to -- I'll respond to this in</p> <p>18 two ways. First within confines of my report, my</p> <p>19 report includes my CV, which provides background</p> <p>20 on my knowledge, training, skills, experience, and</p> <p>21 expertise, and within that, I discussed earlier</p> <p>22 today my experience in looking at hundreds of</p> <p>23 agreements, license agreements regards to pricing</p> <p>24 and other factors.</p> <p>25 Specifically is my second comment, if you</p>
<p style="text-align: right;">Page 67</p> <p>1 here. He's being a reporter.</p> <p>2 Q. And do you know if Doctor Elzinga is qualified to</p> <p>3 be an expert in the software licensing industry?</p> <p>4 A. I don't know Doctor Elzinga's testimony history or</p> <p>5 his specific qualifications. Except that he is --</p> <p>6 again, it states it in the article what he does.</p> <p>7 Q. I'm on Page 17 at the very top of Paragraph 60,</p> <p>8 and you wrote, "Depending on the elements of a</p> <p>9 specific transaction, discounts can range from 20</p> <p>10 to 90 percent."</p> <p>11 My question is the phrase 'elements of a</p> <p>12 specific transaction' what elements are you</p> <p>13 referring to in that phrase in your report?</p> <p>14 A. The elements of a transaction could be multiple,</p> <p>15 and I talk about that issue later in my report.</p> <p>16 If you turn please to Paragraph 65 -- in fact, if</p> <p>17 you -- Paragraph 63 -- 62-63 provide general</p> <p>18 context. I can review those with you if you like,</p> <p>19 but if you turn specifically to Paragraph 65, I</p> <p>20 state, "Software companies will discount the</p> <p>21 prices of their software licenses by significant</p> <p>22 amounts, often to near zero in order to obtain</p> <p>23 other potentially more valuable revenue streams.</p> <p>24 For example, a software company may license</p> <p>25 software at a relatively low price where the</p>	<p style="text-align: right;">Page 69</p> <p>1 turn to Paragraph 64, "In fact, some software</p> <p>2 vendors (e.g., open source vendors) follow a</p> <p>3 strategy of giving away software products and</p> <p>4 making money from other revenue sources such as</p> <p>5 updates, maintenance, support, supplementary</p> <p>6 products that might be used if readily accessible</p> <p>7 to end users, and other relate the activities."</p> <p>8 Q. In the hundreds of agreements that you've looked</p> <p>9 at, what percentage of those involved a license</p> <p>10 fee that was zero?</p> <p>11 A. I've looked at several license agreements that</p> <p>12 have been related to open source, and you've got</p> <p>13 the GN new license, and typically you can download</p> <p>14 that code typically often from DIT, and you can</p> <p>15 use it without paying a license fee.</p> <p>16 So there are hundreds of examples of that,</p> <p>17 but I've looked at agreements, particularly ones</p> <p>18 involving open source where no license fee is paid</p> <p>19 additionally, and typically I might add you also</p> <p>20 have, for example, when you build your stack</p> <p>21 Linux, Apache, they are open source, you don't pay</p> <p>22 a license fee for the software.</p> <p>23 Q. What about software that is not open source or</p> <p>24 does not use open source components; have you ever</p> <p>25 seen license agreements where the -- where the</p>



<p style="text-align: right;">Page 70</p> <p>1 license fee was zero?</p> <p>2 A. Yes.</p> <p>3 Q. What percentage?</p> <p>4 A. I can't provide a specific percentage because, as</p> <p>5 we know sitting around here, license agreements</p> <p>6 are multipage documents, particularly enterprise</p> <p>7 offer license agreements, and terms are</p> <p>8 negotiated, but for example, when I've seen</p> <p>9 agreements where parties have a dispute between</p> <p>10 themselves, and the licensor is interested in</p> <p>11 maintaining a relationship, licensors will often</p> <p>12 provide updated software at no license fee because</p> <p>13 they are interested in the maintenance and support</p> <p>14 as well as the opportunity to sell additional</p> <p>15 services and products, and I've seen that in</p> <p>16 multiple instances, because again, licensors and</p> <p>17 licensees -- there may be a dispute and you seek a</p> <p>18 resolution, and that's one way that I've seen it</p> <p>19 handled.</p> <p>20 Q. And in those instances -- in those instances, the</p> <p>21 licensors were providing an update of the software</p> <p>22 at issue; correct? Is that how I understood your</p> <p>23 testimony?</p> <p>24 A. Or a new product. Because keeping in mind that</p> <p>25 many enterprise license agreements -- and I</p>	<p style="text-align: right;">Page 72</p> <p>1 particular date because budget money has to be</p> <p>2 spent.</p> <p>3 So those are some examples. I can think of</p> <p>4 more if you'd like.</p> <p>5 Q. Those examples that you just gave were examples</p> <p>6 where add-on software was added to the proposal;</p> <p>7 is that accurate?</p> <p>8 A. I disagree with your premise of defining it, and</p> <p>9 if I used the word add-ons, I apologize.</p> <p>10 An enterprise when licensing software is</p> <p>11 licensing whether it's a product, or premises, or</p> <p>12 a software services through the Cloud that</p> <p>13 licensee has products, has certain what they are</p> <p>14 looking for from that software from the licensor.</p> <p>15 As to the word add-ons, if there's add-ons, that's</p> <p>16 part of the entire package. As I noted earlier,</p> <p>17 could be a sweetener to close the deal. It could</p> <p>18 be the licensor saying, hey, I know you don't need</p> <p>19 product A and B right now, but I want to have you</p> <p>20 -- give a license to you for free, try for a</p> <p>21 period of time, and after a couple of years if you</p> <p>22 start using it, then we'll start charging you</p> <p>23 maintenance and support on it.</p> <p>24 All this is back and forth. This ties into</p> <p>25 Paragraph 59 in my report where I say that first</p>
<p style="text-align: right;">Page 71</p> <p>1 discuss this in my report as well. Let's say that</p> <p>2 a licensee is licensing, I'm making this number</p> <p>3 up, five different applications from a licensor,</p> <p>4 and the licensor will -- could offer additional</p> <p>5 applications six, seven, eight, and nine for free</p> <p>6 as part of the package. I've seen that in many</p> <p>7 applications. I've also seen -- many licenses.</p> <p>8 I've seen with respect to pricing where</p> <p>9 enterprise software companies will list the</p> <p>10 various products that the licensee is obtaining,</p> <p>11 whether this is a product license or a SAAS,</p> <p>12 software as a service, and what they will do is</p> <p>13 they will say, okay, you buy product X, Y, and Z</p> <p>14 licenses to use those products, and we will give</p> <p>15 you licenses for products A, B, C, and D zero</p> <p>16 cost, and they will toss it in as a sweetener as</p> <p>17 part of the entire package because they want to</p> <p>18 make the sale.</p> <p>19 It could be the end of a quarter for a</p> <p>20 software company, publicly traded, they've got to</p> <p>21 make the sales as we see, for example, reference</p> <p>22 to those kinds of issues here in this exhibit -- I</p> <p>23 think the Exhibit 2, or one of the exhibits in my</p> <p>24 report, internal FICO report. It's Exhibit 5, and</p> <p>25 in there, there's a discussion of closing by</p>	<p style="text-align: right;">Page 73</p> <p>1 it is important to recognize that license</p> <p>2 agreements are negotiated, and that negotiations</p> <p>3 have become increasingly more complex over time in</p> <p>4 response to changes in technology, greater</p> <p>5 competition amongst software vendors, user needs,</p> <p>6 and globalization. Among other factors.</p> <p>7 Q. Have you ever seen a situation where a software</p> <p>8 company licensed a single software program to a</p> <p>9 licensee perpetually for zero, for nothing?</p> <p>10 A. So let's be sure I understand this. You've taken</p> <p>11 off the table the -- let's, you know, let's have</p> <p>12 this if you will universe of software license</p> <p>13 agreements. So you've taken off the table open</p> <p>14 source, although that's a huge part of the</p> <p>15 industry --</p> <p>16 Q. Correct Doctor Kursh.</p> <p>17 A. You've taken off the table the typical give and</p> <p>18 take in negotiations. So now we're down to one</p> <p>19 little piece of a particular license agreement</p> <p>20 that a software licensor would give the software</p> <p>21 to a licensee for free.</p> <p>22 Q. Correct.</p> <p>23 A. I've seen that in the consumer market. I can't,</p> <p>24 as I sit here at the moment, think of it in the</p> <p>25 enterprise market. There may be some situations,</p>



<p style="text-align: right;">Page 74</p> <p>1 I just can't recall it at this time, but I have  2 seen it in the consumer market.  3 Q. And tell me about those examples in the consumer  4 market.  5 A. Several years ago you had a software program for  6 personal accounting and finance, and the primary  7 player in that market is Intuit's Quicken product.  8 So somebody -- this was through Computer  9 Associates, had a program that provided similar  10 functionality, and they offered it for free, and  11 all you had to do was sign up and pay shipping  12 costs. That's one example.  13 I've seen other examples in the small and  14 mid-sized business space as well.  15 MR. FLEMING: When you're done with the  16 topic, can we take a short break?  17 MS. KLIEBENSTEIN: Yeah. Hold on. You  18 know, can I finish one thing up, and then we will  19 break for lunch? What do you think about that?  20 BY MS. KLIEBENSTEIN:  21 Q. Let's turn to Paragraph 63. Is it your opinion  22 that potential revenue streams from related  23 products and services can sometimes be worth more  24 financially than the license fees for a piece of  25 software?</p>	<p style="text-align: right;">Page 76</p> <p>1 A. I don't understand your question. Because updates  2 and the costs of keeping it going the licensor is  3 compensated through maintenance and support fees.  4 Q. Presuming that maintenance and support fees are  5 charged; correct?  6 A. Customs and practices in the industry at the  7 enterprise level, maintenance and support fees are  8 charged.  9 Now, there are different ways that the  10 charge may be incurred. For example, some  11 enterprises may want you -- and I discussed this  12 earlier, may want the maintenance and support fees  13 for several years to be bundled in up front  14 because of budget constraints, or because of  15 leasing terms, or because of their internal  16 accounting situations as to whether they  17 capitalize or expense the investment in software,  18 but yes, with enterprises maintenance and support  19 fees customary practice are charged. As to the  20 percentage, it will vary by companies, and  21 negotiated between the parties.  22 Q. Just to make --  23 A. Percentage of the initial license fee.  24 Q. Just to make sure we're on the same page with each  25 other, the -- the phrase 'enterprise software</p>
<p style="text-align: right;">Page 75</p> <p>1 A. You need to give me specific examples. You mean  2 in the enterprise? From a licensor's perspective?  3 What do you mean?  4 Q. Correct. Yeah. Let's -- I'll ask it again, and  5 let's -- let's frame it in the context of  6 Paragraph 63.  7 At the end of that paragraph, you say,  8 "Revenue from license sales the are often times  9 secondary at the time of license and thereafter to  10 other revenue sources," and what I'm wondering is  11 the meaning of the term secondary. Are you -- is  12 it your opinion that revenue from other sources is  13 often more than revenue from license sales from  14 the licensor's perspective?  15 A. Yes. I can explain if you'd like.  16 Q. Hold on just a second. Back up to the top of that  17 paragraph, "There's little or no cost in giving  18 away software programs." Focusing on the word  19 cost, what do you mean by the word cost?  20 A. If you turn please to --  21 Q. On Paragraph 63.  22 A. The predecessor Paragraph 62 explains why.  23 Because you're at zero marginal cost for software.  24 Q. Have you given any consideration to the cost of  25 updating software and further developing it?</p>	<p style="text-align: right;">Page 77</p> <p>1 license' what does that mean to you?  2 A. Software license to enterprises.  3 Q. And what is the scope of that license;  4 enterprise-wide? Is that --  5 A. That's a different issue. I can explain if you  6 like. The scope is part of the scope of rights  7 granted with the license to the enterprise, and  8 that's negotiated between the parties.  9 Q. In Paragraph 63, you mention reputational  10 benefits. Can you list the reputational benefits  11 that you refer to?  12 A. Sure. When licensing software to enterprises,  13 many times enterprises will seek for -- seek  14 further discounts than what's offered in return  15 for being a named account, in return for appearing  16 at conferences from the perspective of the  17 software licensor, and we see that specifically in  18 this matter where we see an e-mail from Mr.  19 Schreiber in regard to one of the issues in this  20 matter essentially saying this is a good client.  21 I assume, again, it's a referenceable account. In  22 fact, as I recall, FICO even lists the defendant  23 on its website. So the reputational benefits  24 because it provides more of a halo.  25 Those are some examples of reputational</p>



<p style="text-align: right;">Page 78</p> <p>1 benefits. Part of when you are licensing software</p> <p>2 as a licensor is establishing obviously</p> <p>3 credibility, and part of that is who else is using</p> <p>4 your products.</p> <p>5 Q. And then you --</p> <p>6 A. Or as a software service.</p> <p>7 Q. And you also reference or other benefits. What</p> <p>8 are the other benefits that fall under that</p> <p>9 category?</p> <p>10 A. There can be a variety of other benefits. It</p> <p>11 would be dependant on the particular license, but</p> <p>12 other benefits would be, for example, hiring</p> <p>13 certain staff from the licensee. Another benefit</p> <p>14 would be in terms of providing that licensee</p> <p>15 specific rights to use the software in other ways.</p> <p>16 For example, I've seen this with financial</p> <p>17 institution licenses. One benefit would be that</p> <p>18 they have got exclusivity for the use of that</p> <p>19 software for a period of time, and afterward, they</p> <p>20 will provide information and ongoing, if you will,</p> <p>21 suggestions for the licensor.</p> <p>22 Other benefits would be locating certain</p> <p>23 people at the licensor site to assist in software</p> <p>24 testing and development.</p> <p>25 Those are just some examples. I can think</p>	<p style="text-align: right;">Page 80</p> <p>1 certainly public information as well as my own</p> <p>2 experience, knowledge, and training, and skills,</p> <p>3 education as we talked about.</p> <p>4 Q. The articles and treaties -- treatises that you</p> <p>5 just mentioned however are not cited specifically</p> <p>6 in Paragraph 62 through 65; correct?</p> <p>7 A. They are not. That's correct.</p> <p>8 MS. KLIEBENSTEIN: Why don't we take a</p> <p>9 break for lunch.</p> <p>10 THE VIDEOGRAPHER: We are going off the</p> <p>11 record. The time now is p.m.</p> <p>12 (Whereupon a lunch break was taken from</p> <p>13 p.m. to 12:56 p.m.)</p> <p>14 THE VIDEOGRAPHER: We are back on the</p> <p>15 record. This marks the beginning of Media 3 in</p> <p>16 the deposition of Steven Kursh. The time now is</p> <p>17 p.m.</p> <p>18 BY MS. KLIEBENSTEIN:</p> <p>19 Q. All right. We're ready. Okay Doctor Kursh.</p> <p>20 Let's move on. I'm handing you what was</p> <p>21 previously marked in this case as Exhibit 421.</p> <p>22 Are you familiar with this document?</p> <p>23 A. I'm familiar with sections of the document. As I</p> <p>24 reference in my report, there may be some other</p> <p>25 parts in here that I haven't reviewed, but as I</p>
<p style="text-align: right;">Page 79</p> <p>1 of more if I just, you know, I looked at</p> <p>2 something. If you give me time, I can recall</p> <p>3 more.</p> <p>4 Q. And your support for Paragraph 62 through 65 is</p> <p>5 primarily your prior experience; is that correct?</p> <p>6 A. That's incorrect. There is multiple other</p> <p>7 support. Paragraph 62 there are a number of books</p> <p>8 and articles which talk about the unique economics</p> <p>9 of the software industry. You can look at, for</p> <p>10 example, Michael Cusumano's work. You can look at</p> <p>11 article that have been published in IEEE as well</p> <p>12 as ACM publications.</p> <p>13 Paragraph 63, again, there are articles</p> <p>14 about -- as well as third party independent third</p> <p>15 party material from Gartner, as well as public</p> <p>16 information on right hat open source vendors. A</p> <p>17 lot of this is public information as well as my</p> <p>18 own knowledge and expertise.</p> <p>19 I'll add, if you take a look at my CV,</p> <p>20 there are references, for example, to my reviewing</p> <p>21 publications from IEEE as well as for AAAS as a</p> <p>22 review of multiple articles all there, as well as</p> <p>23 articles in practitioner journals like Ed Cutter,</p> <p>24 as well as academic articles.</p> <p>25 So it's well -- the material I have here is</p>	<p style="text-align: right;">Page 81</p> <p>1 sit here this moment, I'd say I have reviewed it</p> <p>2 but I'm not directly familiar. I'd have to look</p> <p>3 at it in detail, but the sections I reference in</p> <p>4 my report I certainly -- I'm familiar.</p> <p>5 Q. Have you reviewed this document in its entirety</p> <p>6 before?</p> <p>7 A. Yes.</p> <p>8 Q. Do you have an understanding of what this document</p> <p>9 is?</p> <p>10 A. You'll need to be more specific with your</p> <p>11 question.</p> <p>12 Q. I'll ask it a different way. Why did you cite</p> <p>13 this document in your expert report?</p> <p>14 A. Because it was evidence that was relevant to the</p> <p>15 analysis that I did, and accordingly, the opinions</p> <p>16 that I reached.</p> <p>17 Q. Do you know how FICO uses this document in its</p> <p>18 business practices?</p> <p>19 A. Only to the extent that this document is a FICO</p> <p>20 document, that along with deposition testimony,</p> <p>21 for example from Mr. Waid, along with other</p> <p>22 parties, I know that this document or the</p> <p>23 information contained in the document is used by</p> <p>24 FICO with respect to its -- as of the effective</p> <p>25 date of 10-10-03, with respect to its pricing</p>



<p style="text-align: right;">Page 82</p> <p>1 global price list.</p> <p>2 Q. Do you know one way or the other based on your</p> <p>3 review of the deposition transcripts whether FICO</p> <p>4 uses this while its pricing license fees with</p> <p>5 customers?</p> <p>6 A. FICO has got scores of licensees. As to what</p> <p>7 particular sales reps, for example Mr. Sawyer, or</p> <p>8 what executives, for example like Mr. Waid does, I</p> <p>9 don't -- I'm not a fly on the wall in their</p> <p>10 offices so I cannot comment and provide an opinion</p> <p>11 based on the information given to me, which is</p> <p>12 this is a document in evidence regarding FICO's</p> <p>13 pricing, global price list.</p> <p>14 Q. You don't know one way or the other how FICO uses</p> <p>15 this document in its business operations; is that</p> <p>16 correct?</p> <p>17 MR. FLEMING: Objection. Asked and</p> <p>18 answered.</p> <p>19 THE WITNESS: FICO has got scores of</p> <p>20 employees with scores of licensees. As to how</p> <p>21 each one of each of those use this document, I</p> <p>22 wouldn't know, and I have not seen any evidence</p> <p>23 that provides that information.</p> <p>24 BY MS. KLIEBENSTEIN:</p> <p>25 Q. You have cited the table at 2.2.2, correct, in</p>	<p style="text-align: right;">Page 84</p> <p>1 net license purchase of volume discount schedule."</p> <p>2 I ask now that you turn to Exhibit 2 in my</p> <p>3 report on Page 20, Exhibit 2 is titled FICO's</p> <p>4 Cumulative Net License Purchase Volume Discount</p> <p>5 Schedule, and the information in my report is</p> <p>6 drawing directly from 2.2.2 in the FICO global</p> <p>7 price list, Exhibit 421.</p> <p>8 Q. Let's turn to Section 2.2.3 in Exhibit 421. Have</p> <p>9 you read that section before?</p> <p>10 A. Yes.</p> <p>11 Q. And the title of that section is Marketing</p> <p>12 Reference Client Discount, and my question is</p> <p>13 this: Is the information in 2.2.3 is that an</p> <p>14 example of an additional revenue stream or revenue</p> <p>15 source that you discussed earlier in your report?</p> <p>16 A. I don't understand your question. Because in my</p> <p>17 report, I discussed additional revenue sources.</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 Q. And that marketing support discount would that be</p> <p>24 -- would it be reputational benefit to FICO?</p> <p>25 A. You'll need to ask FICO that.</p>
<p style="text-align: right;">Page 83</p> <p>1 your report?</p> <p>2 A. You need to show me where.</p> <p>3 Q. Certainly. Let's take Exhibit 421, turn to</p> <p>4 Section 2.2.2, and you have cited this table in</p> <p>5 Paragraph 67 of your expert report; correct?</p> <p>6 A. What page is that on of my report?</p> <p>7 Q. Page 20.</p> <p>8 A. Yes. It's Exhibit 2 in my report, and there's one</p> <p>9 preceding it, which is also found in this</p> <p>10 document. Actually from a different FICO</p> <p>11 document.</p> <p>12 Q. What is your understanding of the information</p> <p>13 that's contained in Exhibit 2 of your report which</p> <p>14 is the same as the chart shown in Section 2.2.2 of</p> <p>15 Exhibit 421?</p> <p>16 A. I don't understand your question. The document</p> <p>17 speaks -- the document, FICO business signs,</p> <p>18 enterprise decision management, design and</p> <p>19 deployment tools and infrastructure software</p> <p>20 global price list, Exhibit 421, speaks for itself.</p> <p>21 Q. So you can't -- you can't characterize it any</p> <p>22 other way other than to say that data speaks for</p> <p>23 itself?</p> <p>24 A. No. You asked me what it states, 2.2.2 states,</p> <p>25 and this is FICO's document, "Standard cumulative</p>	<p style="text-align: right;">Page 85</p> <p>1 Q. You don't know one way or the other?</p> <p>2 A. I did not write this FICO document. I can talk</p> <p>3 about customs and practices in the industry, but I</p> <p>4 have -- I have not worked at FICO, and even if I</p> <p>5 did, again, FICO has scores of people with scores</p> <p>6 of licensees, and as evidenced by the information,</p> <p>7 the evidence in this case, the pricing of products</p> <p>8 and by FICO, as evidenced this in this case, the</p> <p>9 initial enterprise license agreement was about</p> <p>10 one-third of the -- to Federal was not within the</p> <p>11 scope here, which is, again, consistent with my</p> <p>12 opinions regarding software industry.</p> <p>13 Q. So a licensee providing marketing support to a</p> <p>14 licensor is -- is not a form of additional benefit</p> <p>15 in the licensing industry?</p> <p>16 A. I don't understand your question. If we turn</p> <p>17 back --</p> <p>18 Q. I'll ask it a different way.</p> <p>19 A. -- to what I wrote, I'll stand by what I wrote.</p> <p>20 If the customer provides potential revenue streams</p> <p>21 and related products and services, reputational</p> <p>22 benefits, or other benefits. So in other words,</p> <p>23 here if the customer does this, [REDACTED]</p> <p>24 [REDACTED] stating in this document, I don't</p> <p>25 know each one of their transactions, each being</p>



<p style="text-align: right;">Page 86</p> <p>1 FICO's, but they are suggesting in this particular</p> <p>2 document [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 This reflects the fact that when these</p> <p>5 kinds of discounts are offered it is consistent</p> <p>6 with what I wrote in Paragraph 63. It enables the</p> <p>7 licensor to benefit from a press release, acting</p> <p>8 as a reference account, providing development of a</p> <p>9 case study, which would typically often appear --</p> <p>10 or a white paper which would appear on the website</p> <p>11 of the licensor, or trade materials, et cetera.</p> <p>12 Q. Let's turn to Page 20 of Exhibit 421.</p> <p>13 MR. FLEMING: Page 20 of 27?</p> <p>14 MS. KLIEBENSTEIN: Yes.</p> <p>15 THE WITNESS: Page 20 of 27. I'm there.</p> <p>16 Bates Number FICO 0057405.</p> <p>17 BY MS. KLIEBENSTEIN:</p> <p>18 Q. Let's look at Section 7.4. Can you tell me your</p> <p>19 understanding of how FICO prices on a named</p> <p>20 application basis?</p> <p>21 A. And your question is what? I'm sorry.</p> <p>22 Q. I wanted to hear your understanding of how FICO</p> <p>23 prices licenses on a named application basis.</p> <p>24 A. Well, again, drawing from this specific document,</p> <p>25 this is FICO's global price list, Exhibit 421.</p>	<p style="text-align: right;">Page 88</p> <p>1 of conditional data requirements, small, medium,</p> <p>2 large, very large, and the license fee for each</p> <p>3 one of those in the third column.</p> <p>4 Q. And the table you were just referring to is under</p> <p>5 7.4.1; am I correct?</p> <p>6 A. Correct.</p> <p>7 Q. Okay. Let's move up to the very first table.</p> <p>8 Let's focus on the small, medium, and large --</p> <p>9 small, medium, large, very lodge concept. Do you</p> <p>10 have an understanding of what those different</p> <p>11 categories refer to?</p> <p>12 A. Yes.</p> <p>13 Q. And what is that?</p> <p>14 A. Based on Mr. Waid's testimony, along with other</p> <p>15 documents in this case, it is [REDACTED]</p> <p>16 [REDACTED], and I referenced that.</p> <p>17 Q. Have you seen other licensors in the software</p> <p>18 industry price their software on an application</p> <p>19 basis in this manner using the small, medium,</p> <p>20 large, very large designations?</p> <p>21 A. In what manner?</p> <p>22 Q. In the manner to categorize different uses of that</p> <p>23 software by a licensee for the purpose of setting</p> <p>24 a license fee?</p> <p>25 A. How we define small, medium, large, very large</p>
<p style="text-align: right;">Page 87</p> <p>1 There's language here as to how FICO prices on the</p> <p>2 named application basis.</p> <p>3 However as we have seen in this matter, as</p> <p>4 well as I've seen in other engagements, management</p> <p>5 consultant, expert witness, and my own personal</p> <p>6 experience of what a price list has may not often</p> <p>7 be followed by your employees as long as they get</p> <p>8 approval, assuming approval is needed, by a higher</p> <p>9 level executive as well as by particular</p> <p>10 negotiations with the licensee. This, again, is</p> <p>11 consistent with my opinions. It's negotiable.</p> <p>12 However focusing specifically on the</p> <p>13 language, 7.4.1, named application or business</p> <p>14 function pricing for Blaze Advisor options, it</p> <p>15 states, "As add-on sales to existing customers or</p> <p>16 as part of additional sale," -- "initial sale, the</p> <p>17 following options are currently available with</p> <p>18 Blaze Advisor."</p> <p>19 There are multiple sentences there. I can</p> <p>20 read them, but in the interests of saving time,</p> <p>21 I'll reference you to the document. It then shows</p> <p>22 a table with high performance code generation, for</p> <p>23 example, Java, and then XML manager for insurance,</p> <p>24 which is just using XML, extensible markup</p> <p>25 language, for document definition and enforcement</p>	<p style="text-align: right;">Page 89</p> <p>1 will vary depending on the metrics that the</p> <p>2 licensor chooses to use, as well as what the</p> <p>3 licensee will agree to.</p> <p>4 Those metrics could be any number of</p> <p>5 factors. The evidence in this case, per Mr.</p> <p>6 Waid's [REDACTED] s.</p> <p>7 Q. And that wasn't my question. My question was:</p> <p>8 Have you seen other licensors price their software</p> <p>9 on a named application basis in a similar manner</p> <p>10 to the methodology set forth in Section 7.4?</p> <p>11 A. You need to define similar manner if -- if you</p> <p>12 could because licensors price on a variety of</p> <p>13 metrics. They may use small, medium, large. They</p> <p>14 may use -- well, they used to use CPUs. It's not</p> <p>15 used as much anymore. They may use a variety of</p> <p>16 other metrics.</p> <p>17 Licensors will use those metrics.</p> <p>18 Licensees will negotiate. So I don't understand</p> <p>19 what you mean by similar manner.</p> <p>20 I will -- if you mean similar manner to be</p> <p>21 looking at a licensee and the software which is</p> <p>22 being licensed, you can use a variety of ways.</p> <p>23 I talked earlier about, for example, when I</p> <p>24 ran a software company one of our metrics that</p> <p>25 people could choose the license by was by number</p>



<p style="text-align: right;">Page 90</p> <p>1 of transactions. We had other metrics too. We</p> <p>2 had fixed monthly fees.</p> <p>3 Licensors use a variety of methods. It</p> <p>4 depends on the industry, depends on licensees,</p> <p>5 depends on competition. Depends on a variety of</p> <p>6 other factors.</p> <p>7 I can give you multiple other ones if you</p> <p>8 give me a few moments to think about it.</p> <p>9 Q. Thank you for that information. My question was:</p> <p>10 Have you seen -- focusing on the small, medium,</p> <p>11 large, very large metric, have you seen other</p> <p>12 software licensors price a software license using</p> <p>13 those same metrics; small, medium, large, very</p> <p>14 large?</p> <p>15 A. What are you defining as -- what are you counting</p> <p>16 to then say small, medium, large, very large?</p> <p>17 What are you counting? Are you counting, for</p> <p>18 example --</p> <p>19 Q. I'm not counting anything right now. I'm just</p> <p>20 asking: Have you seen other licensors in the</p> <p>21 software industry have pricing terms that start</p> <p>22 with small, medium, large, very large on an</p> <p>23 application basis?</p> <p>24 MR. FLEMING: Object. Asked and answered.</p> <p>25 THE WITNESS: I have seen, as we've talked</p>	<p style="text-align: right;">Page 92</p> <p>1 normally with might talk about constraints.</p> <p>2 A lot of times large licensees say we'll</p> <p>3 write you a check, and we don't want to be</p> <p>4 bothered with this stuff. I've seen that.</p> <p>5 BY MS. KLIEBENSTEIN:</p> <p>6 Q. So you would --</p> <p>7 A. Frequently.</p> <p>8 Q. You would agree then that FICO's pricing structure</p> <p>9 for named application licensing of Blaze Advisor</p> <p>10 is industry standard because there's so much</p> <p>11 variability in the industry?</p> <p>12 A. No. I'm uncomfortable with the word standard</p> <p>13 because it is one of the ways, and FICO can choose</p> <p>14 as a software company whatever metrics it wants to</p> <p>15 price its software. As to whether or not</p> <p>16 licensees choose to go along, that's negotiated</p> <p>17 between the parties.</p> <p>18 Q. And turning to Page 21 of Exhibit 421, have you</p> <p>19 reviewed Exhibit -- Section 7.5 before?</p> <p>20 A. Yes, and in fact, this is Exhibit 1 in my report,</p> <p>21 that table from 7.5, Page 21 of 27 in FICO's</p> <p>22 global price list.</p> <p>23 Q. And 7.5 discusses enterprise business unit pricing</p> <p>24 guidelines; isn't that right?</p> <p>25 A. It does.</p>
<p style="text-align: right;">Page 91</p> <p>1 about, hundreds of licenses. I have seen a</p> <p>2 variety of different metrics. I have seen metrics</p> <p>3 like number of transactions, and in fact, I've</p> <p>4 done that with my own company, but I've also seen</p> <p>5 metrics of small, medium, or other kinds of</p> <p>6 labels.</p> <p>7 It varies by the software company what they</p> <p>8 want to use. You see things like silver, gold,</p> <p>9 platinum, diamond. You see stuff like how they</p> <p>10 set up -- this is all within the province of what</p> <p>11 the software licensor chooses to use relative to</p> <p>12 competition, relative to their history, relative</p> <p>13 to what licensees are used to. It varies across</p> <p>14 the map.</p> <p>15 So sure -- and I keep going back.</p> <p>16 Licensors use a variety of metrics when they price</p> <p>17 enterprise software.</p> <p>18 So the manner of which you talk is do you</p> <p>19 use -- do you as a licensor use metrics to price</p> <p>20 software. The answer may be yes. I've seen many</p> <p>21 situations where there isn't a metric, it's just a</p> <p>22 flat license fee and the licensee can use it on an</p> <p>23 enterprise-wide basis for unlimited number of</p> <p>24 transactions in a variety of different</p> <p>25 environments and a variety of other metrics where</p>	<p style="text-align: right;">Page 93</p> <p>1 Q. And under the first sentence, I see six different</p> <p>2 bullets. Do you see those as well?</p> <p>3 A. Yes.</p> <p>4 Q. Would you agree that those are different factors</p> <p>5 that -- that FICO takes into consideration when</p> <p>6 it's pricing its enterprise licenses?</p> <p>7 A. I would agree that this is what's written into the</p> <p>8 document. As to what particular individuals at</p> <p>9 FICO do, and what particular specific software</p> <p>10 license agreements exist with licensees, there are</p> <p>11 other ways, but certainly in this document, it</p> <p>12 outlines it, and I'll note please, again, in</p> <p>13 FICO's document, the first sentence that you</p> <p>14 reference here, "[REDACTED]"</p> <p>15 "[REDACTED]"</p> <p>16 "[REDACTED]"</p> <p>17 "[REDACTED]" in other</p> <p>18 words, these are some of the metrics that FICO may</p> <p>19 well use along with other metrics depending on the</p> <p>20 situation, but I will certainly agree with you</p> <p>21 that this calls out some of the metrics or perhaps</p> <p>22 the metrics for what they use when they price</p> <p>23 enterprise licenses.</p> <p>24 Q. And calling out the phrase "[REDACTED]"</p> <p>25 "[REDACTED]" given what I've heard you say</p>



<p style="text-align: right;">Page 94</p> <p>1 about the variability in enterprise pricing, you</p> <p>2 would agree that it's difficult to have list</p> <p>3 prices for an enterprise license; is that right?</p> <p>4 MR. FLEMING: Objection. Multiple</p> <p>5 questions.</p> <p>6 THE WITNESS: I don't understand your</p> <p>7 question. Because FICO claims, for example, that</p> <p>8 they use software -- Mr. Waid in his deposition</p> <p>9 claimed that he used software, first the nine grid</p> <p>10 matrix, which I reference in the report, and also</p> <p>11 salesforce.com, and you can build models that have</p> <p>12 list prices based on certain metrics, and you can</p> <p>13 use those models, and you can replicate what is in</p> <p>14 those models.</p> <p>15 In citing the evidence in this case, what</p> <p>16 we see is in Mr. Waid's testimony and other</p> <p>17 evidence an inconsistency, i.e., the models used</p> <p>18 cannot be -- the information cannot be replicated,</p> <p>19 but there are many software companies that have</p> <p>20 got models that do replicate, and FICO has claimed</p> <p>21 these models are used, and yet I don't -- you</p> <p>22 could -- Mr. Waid could not replicate that</p> <p>23 information. Instead he talked about meeting with</p> <p>24 people, and coming up with some numbers, and back</p> <p>25 and forth among them.</p>	<p style="text-align: right;">Page 96</p> <p>1 products, and then you've got enterprise</p> <p>2 licensing, which is a probable number of</p> <p>3 application, also from the licensee as perspective</p> <p>4 where it's being used.</p> <p>5 Q. So enterprise licensing that license is a probable</p> <p>6 number of applications? I don't understand --</p> <p>7 A. I'd have to look at the particular license</p> <p>8 agreements which call out what is being -- what</p> <p>9 rights are being granted to the licensee. Because</p> <p>10 you're asking me a general question, it really</p> <p>11 depends on the license.</p> <p>12 (Whereupon material was marked for</p> <p>13 identification as Exhibit 516.)</p> <p>14 BY MS. KLIEBENSTEIN:</p> <p>15 Q. I'm handing you what's been marked as Exhibit 516.</p> <p>16 Are you familiar with this exhibit?</p> <p>17 A. Yes. I've seen this information. I don't recall</p> <p>18 the very first page, not the cover page, but I'm</p> <p>19 sure it's been -- again, I've looked at thousands</p> <p>20 of pages of documents in this case.</p> <p>21 Q. Is this the sizing matrix you just referred to</p> <p>22 that's focused on what you believe to be</p> <p>23 transactions primarily?</p> <p>24 A. Sizing metrics I refer to is specifically in my</p> <p>25 report. I'll reference you to Exhibit 15, which</p>
<p style="text-align: right;">Page 95</p> <p>1 So FICO may have used these factors, but</p> <p>2 again, per Mr. Waid's deposition testimony, it is</p> <p>3 primarily transactions.</p> <p>4 BY MS. KLIEBENSTEIN:</p> <p>5 Q. For enterprise pricing or application based</p> <p>6 pricing?</p> <p>7 A. Well, if it's applications, the applications are</p> <p>8 tied within the enterprise license which</p> <p>9 applications are licensed. Ultimately it gets</p> <p>10 down to number of transactions, and then you build</p> <p>11 it up. You have the number of applications that</p> <p>12 are licensed as FICO lists the size of</p> <p>13 applications, and they list other factors here as</p> <p>14 well in this document.</p> <p>15 As to what Mr. Waid does, again, he's been</p> <p>16 deposed on this, and it is not clear as to what</p> <p>17 exactly he does, and he can't replicate what he</p> <p>18 did.</p> <p>19 Q. Do you understand the difference between the way</p> <p>20 FICO defines application based pricing and</p> <p>21 enterprise/business unit pricing?</p> <p>22 A. Generally I do.</p> <p>23 Q. And what is that understanding?</p> <p>24 A. An application, as we state here, is a named</p> <p>25 application that FICO has, for example, particular</p>	<p style="text-align: right;">Page 97</p> <p>1 is from this page, which does not have a Bates</p> <p>2 number on it, which is why, again, I'll reference</p> <p>3 you to my report, and that comes in from the</p> <p>4 deposition of Mr. Waid, Page 14 and 15.</p> <p>5 Q. Is there --</p> <p>6 A. Exhibit to his deposition.</p> <p>7 Q. Is there a difference between Exhibit 15 and --</p> <p>8 the Exhibit 15 in your report and Exhibit 516?</p> <p>9 A. No. Exhibit 516 on Page -- there are no page</p> <p>10 number on 516. You have a cover page. You have</p> <p>11 Page 1. You have Page 2. We are referencing</p> <p>12 specifically Page 2, which, again, is what I used</p> <p>13 to do Exhibit 15 in my report. Although the form</p> <p>14 in which I got it is not the same as Exhibit 516.</p> <p>15 It is, again, from the deposition of Mr. Waid,</p> <p>16 January 16, 2019.</p> <p>17 Q. And the title of your Exhibit 15 is FICO's Nine</p> <p>18 Factor Application Sizing Grid; correct?</p> <p>19 A. Yes.</p> <p>20 Q. That's not the enterprise pricing grid; correct?</p> <p>21 A. It's the application sizing grid.</p> <p>22 Q. And there's a difference between application based</p> <p>23 licensing and enterprise based licensing; correct?</p> <p>24 A. Enterprise licensing brings in the applications.</p> <p>25 So you would consider that, but again, I'm not in</p>

25 (Pages 94 - 97)



<p style="text-align: right;">Page 98</p> <p>1 Mr. Waid's head as to how exactly he did it, and</p> <p>2 when I work through what he testified to, I could</p> <p>3 not replicate what he did or how he did it.</p> <p>4 Q. And when you're talking about replication, you're</p> <p>5 talking about categorizing the Federal application</p> <p>6 as small, medium, large, or very large; is that</p> <p>7 right it?</p> <p>8 A. That's one example. There are multiple other</p> <p>9 examples, and I'll --</p> <p>10 Q. That's the only example I asked about. When we</p> <p>11 were talking about enterprise licenses before and</p> <p>12 I had asked you about list prices, you mentioned</p> <p>13 that there was a nine grid matrix. Do you recall</p> <p>14 that?</p> <p>15 A. Yes.</p> <p>16 Q. And is it your opinion that FICO used -- let me</p> <p>17 back up. Is Exhibit 15 is that the nine grid</p> <p>18 matrix that you're referring to?</p> <p>19 A. Yes.</p> <p>20 Q. And is it your position that FICO uses the nine</p> <p>21 grid matrix to price an enterprise license?</p> <p>22 A. It's my position that FICO charges an enterprise</p> <p>23 license fee that's negotiated with licensees.</p> <p>24 It's my position per the evidence received in this</p> <p>25 case that FICO considers applications as defined</p>	<p style="text-align: right;">Page 100</p> <p>1 Q. Let's move back to Exhibit 421.</p> <p>2 A. Exhibit 421 is which? Okay. The global price</p> <p>3 list.</p> <p>4 Q. Section 7.5.</p> <p>5 A. Okay.</p> <p>6 Q. The first bullet. First bullet says, [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 Is -- is that a factor based on your</p> <p>11 experience in the industry that software licensors</p> <p>12 consider when pricing out an enterprise software</p> <p>13 license?</p> <p>14 MR. FLEMING: Objection. The question was</p> <p>15 complex and multiple, but I don't think there was</p> <p>16 a verb -- there's a verb missing in there.</p> <p>17 MS. KLIEBENSTEIN: I'll ask it again.</p> <p>18 There was a verb.</p> <p>19 BY MS. KLIEBENSTEIN:</p> <p>20 Q. This first bullet is this a factor based on your</p> <p>21 experience, is this a factor that software</p> <p>22 licensors consider when pricing out an enterprise</p> <p>23 software license?</p> <p>24 MR. FLEMING: Okay. I object because it's</p> <p>25 ambiguous.</p>
<p style="text-align: right;">Page 99</p> <p>1 in the first page of Exhibit 516 to my deposition,</p> <p>2 which comes, again, as we've been discussing.</p> <p>3 It's also my position that FICO has been</p> <p>4 consistently inconsistent in using its work, and I</p> <p>5 discuss this in my report, with respect to</p> <p>6 application sizing.</p> <p>7 Q. So I want to understand. In your last answer, you</p> <p>8 said, "It's my position per the evidence received</p> <p>9 in this case that FICO considers applications as</p> <p>10 defined in the first page of Exhibit 516."</p> <p>11 I don't understand why you referenced that</p> <p>12 first page of 516 when asked about enterprise</p> <p>13 license pricing. Can you explain that for me</p> <p>14 further?</p> <p>15 A. Sure. Because what we seek to build -- to come up</p> <p>16 with an enterprise license, you have to look at --</p> <p>17 again, I'm not at FICO. I'm not in Mr. Waid's</p> <p>18 head. I was unable to replicate the processes in</p> <p>19 contrast to FICO's representations that they have</p> <p>20 got a organized -- and I'm using my language,</p> <p>21 organized structured consistent process for</p> <p>22 pricing applications, and then accordingly,</p> <p>23 enterprises. That's not what I have seen in the</p> <p>24 evidence in this case, and I document it in my</p> <p>25 report. Now -- so ...</p>	<p style="text-align: right;">Page 101</p> <p>1 THE WITNESS: If you could please rephrase</p> <p>2 your question.</p> <p>3 BY MS. KLIEBENSTEIN:</p> <p>4 Q. What didn't you understand about it?</p> <p>5 A. You've asked me a broad brushed question, and as I</p> <p>6 have testified to earlier today, licensors use a</p> <p>7 variety of different metrics, and those are</p> <p>8 negotiated with licensees.</p> <p>9 FICO has chosen per their global price</p> <p>10 list, and again, limiting this to the global price</p> <p>11 list, not in practice, because I have not seen</p> <p>12 multiple versions of FICO's licensing agreements,</p> <p>13 and as I have emphasized, what's on the global</p> <p>14 price list FICO has been unable to replicate that</p> <p>15 in this case. So I don't know what FICO always</p> <p>16 does --</p> <p>17 Q. And my question is not --</p> <p>18 A. I have not gotten the evidence. However I will</p> <p>19 say in response to your question licensors may</p> <p>20 look at a variety of factors when they price the</p> <p>21 rights to the software, and you've got the rights</p> <p>22 that are granted, you've got the pricing. That's</p> <p>23 a negotiation between a licensor and the licensee</p> <p>24 with enterprise software licenses.</p> <p>25 Q. So my question is a lot simpler than that. With</p>

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1 these six bullets under 7.5, are those or aren't  
 2 those factors the types of metrics licensors  
 3 consider when pricing enterprise software in your  
 4 experience?  
 5 A. Licensors will use a variety of metrics. I will  
 6 say that, for example, the use of Bullet 4 and 5  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
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 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 THE WITNESS: Overall enterprises, and  
 23 there will be other factors as well.  
 24 BY MS. KLIEBENSTEIN:  
 25 Q. What does the phrase commercially reasonable mean

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1 in your report?  
 2 A. Commercially reasonable, as best I can define it  
 3 as I sit here at this moment, and I'll have to  
 4 think about it more, commercially reasonable is  
 5 looking at an issue from customs and practices in  
 6 the industry are the actions taken by the parties  
 7 involved consistent with what is typical in the  
 8 industry as well as, again, whether it's  
 9 consistent within the industry.  
 10 Q. So I've --  
 11 A. And tied in with that is the course of performance  
 12 by the parties as well as without doing contract  
 13 interpretations.  
 14 Again, this is -- my work is not  
 15 interpreting a contract. My work is saying, okay,  
 16 I get the plain meaning of those terms. The devil  
 17 is in the detail how the parties implement it.  
 18 Not implementing like software implementation, how  
 19 the parties have chosen whether it's commercially  
 20 reasonable, i.e., it was -- was it in good faith  
 21 or bad faith is another way of looking at it.  
 22 Q. So an opinion on whether an action is commercially  
 23 reasonable is an opinion on the conduct of the  
 24 parties; correct?  
 25 A. The conduct of the parties relative to customs and

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1 practices in the industry, again, as -- all I can  
 2 do is, in my role as an expert, provide conduct --  
 3 context as to whether that conduct is consistent  
 4 with the industry, and the trier of fact will  
 5 determine whether it is, and my label for conduct  
 6 is is that conduct reasonable or not commercially  
 7 reasonable relative to customs and practices in  
 8 the industry.  
 9 Q. Were you involved in the negotiations between FICO  
 10 and Federal in 2006?  
 11 A. I was not. All I had -- no.  
 12 Q. Were you involved in the negotiations between the  
 13 parties in 2016?  
 14 A. No.  
 15 Q. And you obviously haven't worked at FICO or  
 16 Federal; correct?  
 17 A. Correct.  
 18 Q. So your interpretation of the actions is from a  
 19 third party looking at the materials, not from  
 20 firsthand experience; correct?  
 21 A. You're absolutely right. I am independent third  
 22 party looking at the evidence in this case.  
 23 That's my role as an expert; an independent review  
 24 of the evidence.  
 25 Q. Have you interviewed anyone at Federal in



<p style="text-align: right;">Page 106</p> <p>1 preparation for your report?</p> <p>2 A. I have spoken with Mr. Harkin, Mr. Murphy, and I</p> <p>3 may have spoken with someone else --</p> <p>4 (Whereupon the reporter asked the witness</p> <p>5 to speak up.)</p> <p>6 THE WITNESS: I may have spoken with</p> <p>7 someone else. I don't recall as I sit here.</p> <p>8 BY MS. KLIEBENSTEIN:</p> <p>9 Q. And I'm not -- I'm not going to ask about your</p> <p>10 conversations with Mr. Murphy. Did you ask anyone</p> <p>11 at Federal what they believed was the scope of the</p> <p>12 license at the time it was entered into in 2006?</p> <p>13 A. I'll respond to that in two ways. First, people</p> <p>14 have -- and this is not meant in a derogatory way.</p> <p>15 People have selected memory. The best -- from my</p> <p>16 role as an independent third party coming in, the</p> <p>17 best way is to look at the documents.</p> <p>18 So, for example, with the license</p> <p>19 agreement, the original license was in June 2006.</p> <p>20 Amendment 2 to that license agreement, which was</p> <p>21 in December of 2006, changed the rights of use by</p> <p>22 the licensee, and that amendment speaks for</p> <p>23 itself.</p> <p>24 So what someone says is all well and good.</p> <p>25 We look at the documents and the other evidence</p>	<p style="text-align: right;">Page 108</p> <p>1 source of evidence to understand the contracts at</p> <p>2 the time they were executed in 2006.</p> <p>3 A. Well, let's be clear. I am not giving a contract</p> <p>4 interpretation. The language in the amendments</p> <p>5 speaks for itself. Amendment 2 from December of</p> <p>6 2006 specifically calls out an enterprise</p> <p>7 (inaudible) -- an enterprise license.</p> <p>8 Additionally there is multiple other</p> <p>9 documents that have been produced in this case</p> <p>10 indicating that FICO knew how Federal was using</p> <p>11 the software with respect to location, and there</p> <p>12 are multiple examples, 2008 for example, the</p> <p>13 discussion in western Europe. There are e-mails</p> <p>14 in that regard, 2012 in England with was it Hamesh</p> <p>15 and Oliver are some examples. It's FICO's</p> <p>16 e-mails. Also Mr. Schreiber basically sending an</p> <p>17 e-mail acknowledging it. Mr. Sawyer saying it was</p> <p>18 a global license, or the equivalent. So there's</p> <p>19 additional information that I also considered.</p> <p>20 So, again, as I go back, you look at the</p> <p>21 documents as an independent third party. People</p> <p>22 have selective memories. Not good or bad, just</p> <p>23 the way we are. We're human. Look at the</p> <p>24 documents, and the documents speak quite clearly</p> <p>25 to a lay person. I'm not a lawyer. For someone</p>
<p style="text-align: right;">Page 107</p> <p>1 available.</p> <p>2 Q. So the answer is no, you didn't ask anyone at</p> <p>3 Federal --</p> <p>4 A. I did not speak with them. Again, I would not</p> <p>5 have asked them because I'm independent. I would</p> <p>6 also need to have spoken to the people at FICO,</p> <p>7 but the best way to understand what happened in</p> <p>8 the past in regard to this matter is to look at</p> <p>9 the documents.</p> <p>10 You asked me about the license. Amendment</p> <p>11 2 specifically calls out the grant of rights, and</p> <p>12 there's other information, documented information</p> <p>13 as to the rights, particularly in regard to it</p> <p>14 being an enterprise license. I document this in</p> <p>15 my report, and we can go through it if you like.</p> <p>16 Q. So it's your opinion that at the time in 2006 the</p> <p>17 best source of evidence, if you will, to</p> <p>18 understand the -- the meaning of the contract is</p> <p>19 -- is the contract and the amendments themselves;</p> <p>20 am I understanding that right?</p> <p>21 A. I don't understand your question.</p> <p>22 Q. I heard you say the amendments speak for</p> <p>23 themselves.</p> <p>24 A. Correct.</p> <p>25 Q. So I'm asking you to confirm what is the best</p>	<p style="text-align: right;">Page 109</p> <p>1 in the software industry, okay, I get what they</p> <p>2 are saying. I understand this grant of license</p> <p>3 rights. Here it is right there, i.e., in the</p> <p>4 documents.</p> <p>5 Q. Did you review any Federal e-mails stating that</p> <p>6 the license was not global in scope?</p> <p>7 A. The only one I -- I reviewed scores of Federal</p> <p>8 e-mails. The only one I can reference at the</p> <p>9 moment is -- that I can recall, but if you have</p> <p>10 other ones, please produce them and I'll do my</p> <p>11 best to respond.</p> <p>12 I remember Ms. Pawloski, but I think she</p> <p>13 was referencing the original agreement and not the</p> <p>14 amendment. So -- and I was not there when she got</p> <p>15 that question. I don't recall in her deposition</p> <p>16 what preceded it and went after it, what her</p> <p>17 e-mail was. I'm not in her mind, but I think</p> <p>18 that's what she was referencing. You'll have to</p> <p>19 ask her, but that's the only one I can recall. If</p> <p>20 there are other ones, please produce them, and</p> <p>21 I'll do my best to respond.</p> <p>22 Q. Your opinion that she was referencing the original</p> <p>23 agreement what -- where does that opinion come</p> <p>24 from? What is it based on?</p> <p>25 A. Well, first, Ms. Pawloski is not an attorney.</p>



<p style="text-align: right;">Page 110</p> <p>1 Second, she has no authority, she's not an 2 authority officer of the company to make any 3 statement in regard to that, and third, you would 4 need to speak with her. I read her deposition 5 testimony, and given what the language in the 6 agreement says, we have to look at the actual 7 agreements as well as the multiple e-mails from 8 FICO. 9 Q. Let's move to Paragraph 70 in your report. 10 A. I'm sorry. What paragraph? 11 Q. Paragraph 70? 12 A. 70? 13 Q. Yup. The first sentence states, "In its 2016 14 negotiations with Federal, FICO took the position 15 that it recently discovered uses that breached the 16 license agreement." 17 Can you clarify for me what uses you're 18 referring to in that sentence? 19 A. The best I can recall sitting here it is -- again, 20 I was not party to those negotiations, but I've 21 seen documents of the -- what I remember was the 22 -- FICO's alleged surprise that they did not know 23 that Federal was using the software outside of the 24 United States, and that -- and then there was 25 discussion back and forth. FICO feeling this was</p>	<p style="text-align: right;">Page 112</p> <p>1 the license agreement? 2 A. What I will testify to this case I have not 3 discussed that with counsel. So I can't -- 4 Q. Let me ask it a different way. Is it your opinion 5 in the report that the installation of the Blaze 6 Advisor software outside the United States by 7 Federal is not a breach of the license agreement? 8 A. That would really be a decision made by the trier 9 of fact. I do not, unless you point out 10 otherwise, say that in my report. 11 Q. In Paragraph 71, the second sentence says, "First, 12 the license agreement does not limit use or 13 installation to the United States." What is your 14 support for that statement? 15 A. I'll ask you please to turn to Paragraph 77, and 16 that will then run through Paragraph 89, and we 17 can go through each one of those paragraphs if you 18 like. 19 Q. No. 20 A. That's the basis of my opinion. 21 Q. I don't want to go through each page, paragraph, 22 but in general, Paragraphs 77 through -- through 23 89 the support for those opinions are documents 24 and testimony from this case; correct? 25 A. Relative to customs and practices in the industry.</p>
<p style="text-align: right;">Page 111</p> <p>1 a breach, and there were discussions about the 2 breach. 3 The merger happened in January 2016. So 4 there were later discussions about Section 10.8, 5 which I discuss in my report. There were multiple 6 discussions between the parties in the 7 negotiations regarding pricing, regarding offers 8 with respect to software. 9 There were also discussions in the 10 negotiations where FICO, for example, Mr. 11 Schreiber wrote an e-mail to Federal essentially 12 saying we've given you time to cure, if you don't 13 cure, there are going to be issues. 14 Q. My question was just about the uses. 15 A. Yeah. Okay. I just -- I'm sorry. It says 16 negotiations. The uses were outside of the United 17 States. 18 Q. Then you were just talking about negotiations. So 19 your support for Paragraph 70 is -- is documents 20 produced in the case; correct? 21 A. Documents including deposition testimony. All the 22 documents. Yeah. The evidence in this case. 23 Q. Do you intend to testify at trial that 24 installation of Blaze Advisor software outside of 25 the United States by Federal is not a breach of</p>	<p style="text-align: right;">Page 113</p> <p>1 For example, in the -- 2 Q. Well, hold on. Before you get into examples, let 3 me understand your answer. 4 So my question was Paragraphs 77 through 89 5 your support for those opinions are the documents 6 and testimony from this case, and then you 7 answered relative to customs and practices in the 8 industry. 9 I don't understand -- that seems like a 10 qualifier and not really an answer. Can you 11 clarify for me? 12 A. Yes. Relative to the customs and practices in the 13 industry, for example, when you've got an 14 agreement that calls that you will be using 15 international law, that would be an indicator that 16 an agreement is more than domestic in the United 17 States. 18 Additionally, relative to customs and 19 practices in the industry, when you have an 20 agreement, and I discuss this with respect to -- 21 if you turn to page -- Paragraph 78, 79, just with 22 respect to the agreements, in my experience, when 23 you see territory called out and it's specific to 24 the United States, the parties also include in 25 that, for example, territories like Puerto Rico,</p>



<p style="text-align: right;">Page 114</p> <p>1 which are an example, but then, more importantly,  2 and I discuss this in 78 and 79, what is defined  3 in the definitions of territory is never used in  4 the agreement or the amendments, the word --  5 (Whereupon the reporter asked the witness  6 to speak up.)  7 THE WITNESS: Territory. That's some  8 examples, I can provide more, which I discuss in  9 this paragraphs all the way through Paragraph 89.  10 BY MS. KLIEBENSTEIN:  11 Q. So Paragraphs 77 through 89 your support is  12 documents and testimony in the case, and the  13 agreement, the license agreement and its  14 amendments themselves?  15 A. Those are documents and evidence in the case.  16 Q. So the answer is yes?  17 A. Again, that's the evidence recognizing that is in  18 the context of my knowledge, training, skills  19 within the industry.  20 Again, I emphasize it is not the existence  21 of those clauses in the agreements. Again, I'm  22 not giving contract interpretations. It is the  23 implementation and the actions relative to customs  24 of the parties, relative to customs and practices  25 in the industry.</p>	<p style="text-align: right;">Page 116</p> <p>1 license agreement was intended to be global in  2 scope; is that correct?  3 A. The first license agreement was signed in June.  4 Amendment 2 expanded the rights the grant of  5 rights to the licensee.  6 Q. We're not talking about the amendment.  7 A. But the amendment supersedes the license.  8 Q. My question was: Is it your opinion that Section  9 10.7 indicates this license agreement was intended  10 to be global in scope? Is it a piece of the  11 puzzle?  12 A. I don't understand what you mean.  13 Q. I'm not talking about the amendments. Your  14 earlier testimony focused on the choice of law  15 provision, suggesting the choice of law provision  16 indicated the license agreement was intended to be  17 global in scope. Am I wrong about that?  18 A. You are correct.  19 Q. Okay.  20 A. And I said the agreements between the parties --  21 if I didn't use the word plural, I'll use it now,  22 and thank you for correcting me.  23 It is my understanding that I saw -- again,  24 I recall seeing a document where the law was not  25 just the state of New York. I can't recall where</p>
<p style="text-align: right;">Page 115</p> <p>1 Q. You mentioned -- you mentioned a choice of law  2 section in the agreement; is that right?  3 A. Yes. As one factor that would indicate that it is  4 more than simply -- I need to see all of the  5 agreements please, not just the original one. I  6 need to see all of them please. Because Amendment  7 2 states specifically that the other agreements --  8 remember the Amendment 2 supersedes --  9 Q. It's in there.  10 A. Okay. Thank you.  11 Q. So the governing law section you mention is  12 Section 10.7?  13 A. I recall seeing documents where it was not simply  14 10.7 with the state of New York, but I can't find  15 it in here, but I recall seeing it somewhere in  16 the documents.  17 Q. Is 10.7 the section you were just referring to  18 about the choice of law?  19 A. That's in the original license agreement, which is  20 superseded by the amendments, 7.2, and I'll  21 acknowledge 10.7, the original license as of June  22 2016, states the law will be governed and  23 constrained in accordance with the laws of the  24 state of New York, and then some other language.  25 Q. And you believe that that section indicates this</p>	<p style="text-align: right;">Page 117</p> <p>1 I saw that now. However, again, we have to look  2 at all of the documents. Amendment 2 specifically  3 calls out an enterprise-wide license.  4 Q. So are you or aren't you taking back your  5 statement that the choice of law provision  6 indicates the scope of use is global in nature?  7 A. Neither. I need to look at the documents, and if  8 I'm mistaken, I stand corrected, but that does not  9 in any way, shape, or form alter my opinion that  10 this was an enterprise-wide license, and that the  11 licensee had the right to use it on an  12 enterprise-wide basis.  13 Federal could use it on an enterprise --  14 use the software on an enterprise-wide basis, and  15 there are multiple documents, again, if you turn  16 to Paragraphs 72, 73, 74, 75, it talks about the  17 territory, 76, territory provision, and Paragraph  18 77 through 89.  19 So again, even if my memory is wrong, I'm  20 human. I make mistakes. I stand corrected. If  21 you take that off the table with respect to the  22 area, the -- what sort of choice of venue in the  23 original agreement doesn't matter. My opinion is  24 the same.  25 Q. Is it your opinion, or do you believe that a</p>



<p style="text-align: right;">Page 118</p> <p>1 choice of law provision in a contract is specific</p> <p>2 to a software license, meaning those term -- that</p> <p>3 choice of law provision is only found in the</p> <p>4 software license?</p> <p>5 MR. FLEMING: Objection. Vague.</p> <p>6 THE WITNESS: I'm not a lawyer, but in</p> <p>7 practically every contract I've ever seen, as well</p> <p>8 as for example NDAs as well as other kinds of</p> <p>9 agreements among parties, you typically choose the</p> <p>10 choice of the governing law as well as issues, for</p> <p>11 example, if there's an arbitration clause --</p> <p>12 BY MS. KLIEBENSTEIN:</p> <p>13 Q. I'm not asking about other stuff.</p> <p>14 A. Stuff like that you. Look at the venue, location.</p> <p>15 I emphasize, again, I'm not a lawyer.</p> <p>16 Q. There's not a -- Doctor Kursh, we've got to stick</p> <p>17 with the question and answer format otherwise</p> <p>18 we're going to be here a long, long time.</p> <p>19 MR. FLEMING: We've been going about an</p> <p>20 hour. If we take a short break.</p> <p>21 MS. KLIEBENSTEIN: Sounds good.</p> <p>22 THE VIDEOGRAPHER: We're going off the</p> <p>23 record. The time now is 2:03 p.m. 0</p> <p>24 (Whereupon a short break was taken from</p> <p>25 2:03 p.m. to 2:12 p.m.) 0</p>	<p style="text-align: right;">Page 120</p> <p>1 had the right to install Blaze Advisor outside of</p> <p>2 the United States?</p> <p>3 A. Federal had an enterprise-wide license. It was</p> <p>4 known to FICO that -- as evidenced by references</p> <p>5 in my report, that it was a global enterprise</p> <p>6 license agreement.</p> <p>7 I'll reference you to Exhibit 5 in my</p> <p>8 report as well as Paragraphs -- as we've been</p> <p>9 discussing today, Paragraph 70 all the way through</p> <p>10 Paragraph 89.</p> <p>11 So the rights were granted in Amendment 2,</p> <p>12 which specifically states, and again, I am not a</p> <p>13 lawyer, and customs and practice in the industry</p> <p>14 as someone who has worked in the industry, I'm</p> <p>15 taking the plain meaning of these words. I'm not</p> <p>16 doing contract interpretation.</p> <p>17 It states, Number 1, this is FICO Bates</p> <p>18 0002294, "All previous licenses granted to client</p> <p>19 under the agreement shall be terminated and</p> <p>20 superseded by the license granted herein," and</p> <p>21 above that, "Whereas under the agreement, client</p> <p>22 was given an option to expand the license granted</p> <p>23 in the agreement to an enterprise-wide license."</p> <p>24 So it was an enterprise-wide license, and</p> <p>25 it superseded the other agreements.</p>
<p style="text-align: right;">Page 119</p> <p>1 THE VIDEOGRAPHER: We are back on the</p> <p>2 record. This marks the beginning of Media 4 in</p> <p>3 the deposition of Steven Kursh. The time now is</p> <p>4 2:12 p.m. 0</p> <p>5 BY MS. KLIEBENSTEIN:</p> <p>6 Q. Doctor Kursh -- oh, first of all, for the record,</p> <p>7 I failed to identify the copy of the agreement</p> <p>8 that we're looking at as -- formerly marked,</p> <p>9 previously marked Deposition Exhibit 314.</p> <p>10 Looking at Footnote 20 of your report, you</p> <p>11 make the statement that, "One cannot use the Blaze</p> <p>12 software without installing it." What is your</p> <p>13 support for that statement?</p> <p>14 A. I don't understand your question. You may have</p> <p>15 software, but if you don't install it, you're not</p> <p>16 using it.</p> <p>17 Q. So it's your understanding based on the agreement</p> <p>18 that because Federal had -- had a license to use</p> <p>19 the software it bought it also had permission to</p> <p>20 install the software it bought? Am I</p> <p>21 understanding that right?</p> <p>22 A. I don't understand your question at all. Please</p> <p>23 explain.</p> <p>24 Q. Sure. Is it your opinion that based on the</p> <p>25 license agreement and its amendments that Federal</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. Enterprise-wide license to do what?</p> <p>2 A. Well, use the software, and in order -- well, to</p> <p>3 use the software, Blaze Advisor.</p> <p>4 Q. Do you know whether or not it's possible to use</p> <p>5 the software, Blaze Advisor software in a location</p> <p>6 different from where the Blaze Advisor software</p> <p>7 was installed?</p> <p>8 A. I'm -- when you as an enterprise want a software</p> <p>9 license to enterprises, the software which I have</p> <p>10 not seen but in my experience, to do an</p> <p>11 enterprise-wide license, software like Blaze, one</p> <p>12 should be able to access the software from a</p> <p>13 remote location. So it would not be on your</p> <p>14 server, but you would be using the software on</p> <p>15 your computer.</p> <p>16 Q. In your experience with software licenses, did you</p> <p>17 ever run across export control terms?</p> <p>18 A. In two ways. The first, I've seen export controls</p> <p>19 on software that has been used, and the federal</p> <p>20 government sets controls on that software being</p> <p>21 used abroad.</p> <p>22 I've also seen export controls by licensors</p> <p>23 limiting, for example, a global license, an</p> <p>24 enterprise-wide license on a global scale but it</p> <p>25 cannot be used in specific countries.</p>



<p style="text-align: right;">Page 122</p> <p>1 I saw no such language being called out in</p> <p>2 the agreements here. I do however see in</p> <p>3 Paragraph 10.7, original agreement, the reference</p> <p>4 to the international. That's where I got the</p> <p>5 international part. It's in Paragraph 10.7 of the</p> <p>6 original agreement, but nonetheless, per my</p> <p>7 earlier testimony, even taking that off the table,</p> <p>8 I stand by my opinions, that it was an</p> <p>9 enterprise-wide license, and that the licensee had</p> <p>10 locations outside of the United States that FICO</p> <p>11 knew about.</p> <p>12 Q. Do you know under what circumstances a software</p> <p>13 licensor would use export control language in a</p> <p>14 software license contract?</p> <p>15 A. It would depend on the licensor.</p> <p>16 Q. Give me an example.</p> <p>17 A. You don't like your software being used in certain</p> <p>18 countries, or by people in certain countries. You</p> <p>19 don't want your software being used elsewhere. In</p> <p>20 other words, where it is loaded on the server, but</p> <p>21 it really depends on the licensor.</p> <p>22 Each licensor may choose to have in the</p> <p>23 agreement agreements what they choose and the</p> <p>24 licensee. It's negotiated between the parties.</p> <p>25 (Whereupon the reporter asked the witness</p>	<p style="text-align: right;">Page 124</p> <p>1 of the four corners of the documents and</p> <p>2 understanding of how, again, licensor and licensee</p> <p>3 negotiate, they read a document. So you don't</p> <p>4 need to be there when negotiating. The document</p> <p>5 puts into writing and the parties sign it. That's</p> <p>6 their understanding, and I state that in my report</p> <p>7 in slightly different words.</p> <p>8 Q. I see in Paragraph 72 it is your opinion that the</p> <p>9 agreement, Section 2, license grant does not</p> <p>10 include any language about Federal's use or</p> <p>11 installation being limited to a specific</p> <p>12 geographic area. Is your support for that opinion</p> <p>13 the agreement itself?</p> <p>14 A. Define agreement.</p> <p>15 Q. The agreement and its amendments in Exhibit 314.</p> <p>16 A. There is no specific use of the word territory</p> <p>17 outside of the definitions, Section 1, of the</p> <p>18 software license and maintenance agreement that</p> <p>19 was executed in June of 2006.</p> <p>20 There is no use of the word territory under</p> <p>21 license grant or in the amendments specifically</p> <p>22 using the word territory.</p> <p>23 Q. So your opinion is based solely on the presence or</p> <p>24 absence of the word territory; is that correct?</p> <p>25 A. That's incorrect. My opinion is stated in my</p>
<p style="text-align: right;">Page 123</p> <p>1 to speak up.)</p> <p>2 THE WITNESS: Apologize.</p> <p>3 BY MS. KLIEBENSTEIN:</p> <p>4 Q. What is the export of software? What is that act?</p> <p>5 Is that shipment? Is it -- do you know?</p> <p>6 A. I'd have to see the language, but again, I'm not a</p> <p>7 software export -- I wouldn't know that straight</p> <p>8 off of my head. You'll need to show me documents.</p> <p>9 Q. But you --</p> <p>10 A. And I'll do my best to respond.</p> <p>11 Q. You're positioning yourself as a software</p> <p>12 licensing expert in this case; right?</p> <p>13 A. Yes, but I've not seen any -- in the complaint</p> <p>14 filed by your client, I've not seen any issue with</p> <p>15 respect to export controls.</p> <p>16 So at this time I sit here, I don't recall</p> <p>17 seeing it, and I didn't consider that issue. If</p> <p>18 it is a relevant issue, counsel for Federal may</p> <p>19 ask me to consider it, and if so, you will be duly</p> <p>20 notified.</p> <p>21 Q. Based on your expertise, is export control</p> <p>22 language used in software licenses when the</p> <p>23 software product may be exported?</p> <p>24 A. That's a really general question. I would need to</p> <p>25 see specific agreements, and again, it's all part</p>	<p style="text-align: right;">Page 125</p> <p>1 report, all of my opinions, which are that this</p> <p>2 was, and FICO knew it was, an enterprise-wide</p> <p>3 license, and that Federal had facilities outside</p> <p>4 of the United States. Federal knew that. FICO --</p> <p>5 not Federal. Excuse me. FICO knew that, and</p> <p>6 there's documentation evidence in the record</p> <p>7 indicating that FICO knew that Federal was using</p> <p>8 Blaze Advisor outside of the United States.</p> <p>9 Q. Did you see any evidence that showed FICO knew</p> <p>10 Federal had installed Blaze Advisor outside the</p> <p>11 United States before 2016?</p> <p>12 A. I'll reference you to Exhibit 8 in my report.</p> <p>13 This is the first of several exhibits -- let's go</p> <p>14 back.</p> <p>15 First I'll reference you to Paragraph 73 in</p> <p>16 my report, which is the deposition testimony of</p> <p>17 Mr. Wachs from FICO where he testified he expected</p> <p>18 to see the license grant section referenced --</p> <p>19 Q. No. My question is about installation</p> <p>20 specifically.</p> <p>21 A. I'm finishing. Okay. Well, it states -- again,</p> <p>22 you'll need to show me the language in the</p> <p>23 agreements which distinguishes, again, the license</p> <p>24 was granted so I understand, again, where you're</p> <p>25 going with use and installation. Let's walk</p>



<p style="text-align: right;">Page 126</p> <p>1 through the agreements. Show me what you're</p> <p>2 referring to. I'll do my best to answer, but what</p> <p>3 we have in Exhibit 8 is Mr. Sawyer saying they,</p> <p>4 that's in reference to Federal, have a global ELA</p> <p>5 for Blaze.</p> <p>6 If you turn to Mr. Schreiber's e-mail,</p> <p>7 which is referenced in my bibliography, Mr.</p> <p>8 Schreiber acknowledges that it is a global</p> <p>9 license.</p> <p>10 There's also as I mentioned in 2012, this</p> <p>11 is Exhibit 7, Mr. Moffat to Hamesh, I mentioned</p> <p>12 the name Hamesh earlier, it says that "no</p> <p>13 additional Blaze licenses are needed as it is</p> <p>14 covered within the overall global Blaze ELA."</p> <p>15 So there's multiple evidence.</p> <p>16 Exhibit 6, Oliver Clark, he states, "I know</p> <p>17 of no restrictions in the license that prevent</p> <p>18 them from doing so," which is a reference, again,</p> <p>19 Mr. Clark as I recall wrote that.</p> <p>20 So there are multiple examples where FICO</p> <p>21 knows that Federal has the rights to have a global</p> <p>22 enterprise license agreement and use it globally.</p> <p>23 Q. That was not my question.</p> <p>24 MR. FLEMING: Can we just take a super</p> <p>25 short break, like, two minutes?</p>	<p style="text-align: right;">Page 128</p> <p>1 States.</p> <p>2 Q. So your opinion is not based on the placement of</p> <p>3 the word territory in the June 30th, 2006</p> <p>4 agreement?</p> <p>5 A. No. My opinions are called out in my report. I</p> <p>6 discuss the issue of territory beginning in</p> <p>7 Paragraph 70 all the way through to Paragraph 89.</p> <p>8 In other words, in the scope of the rights</p> <p>9 granted in the license and the amendments, I</p> <p>10 discuss the -- among many topics the territory and</p> <p>11 how it is simply a term under definitions and is</p> <p>12 not used elsewhere, but that's not the sole reason</p> <p>13 for my opinion.</p> <p>14 Q. You mentioned that you -- you were taking a plain</p> <p>15 reading of the contracts in Exhibit 314; is that</p> <p>16 right?</p> <p>17 A. Yes.</p> <p>18 Q. If you're taking a plain reading, why do we need</p> <p>19 an expert in the software licensing industry to</p> <p>20 provide opinions on how to read the agreements</p> <p>21 themselves?</p> <p>22 A. I don't understand your question. My focus was</p> <p>23 reviewing the actions of the parties in this</p> <p>24 matter. The agreements are part of that. There's</p> <p>25 other documents as well, which I call out in my</p>
<p style="text-align: right;">Page 127</p> <p>1 MS. KLIEBENSTEIN: Okay.</p> <p>2 THE VIDEOGRAPHER: We are going off the</p> <p>3 record. The time now is 2:28 p.m. 0</p> <p>4 (Whereupon a short break was taken from</p> <p>5 2:28 p.m. to 2:29 p.m.) 0</p> <p>6 THE VIDEOGRAPHER: We are back on the</p> <p>7 record. The time now is 2:29 p.m. 0</p> <p>8 BY MS. KLIEBENSTEIN:</p> <p>9 Q. So Doctor Kursh, to recap, your opinions about the</p> <p>10 territorial scope of use of the agreement are</p> <p>11 based on, Number 1, the placement of the word</p> <p>12 territory in the agreement, and Number 2, the</p> <p>13 documents and e-mails exchanged between the</p> <p>14 parties; is that correct?</p> <p>15 A. That's incorrect. My opinions in regard to the</p> <p>16 license agreement and the amendments using the</p> <p>17 plain language, not interpreting contracts, but</p> <p>18 the language specifically calls out in Amendment 2</p> <p>19 that it is an enterprise-wide license.</p> <p>20 Additionally there is numerous</p> <p>21 documentation -- and this amendment was in</p> <p>22 December 2006. There are e-mails from 2008 with</p> <p>23 respect to Europe, e-mails from 2012 with respect</p> <p>24 to England that indicate that FICO knew that it</p> <p>25 was being used by Federal outside of the United</p>	<p style="text-align: right;">Page 129</p> <p>1 report. So I don't understand your question.</p> <p>2 Again, as I -- I don't understand your question.</p> <p>3 Q. If you're -- if you are taking a plain reading of</p> <p>4 the agreements in providing these opinions, those</p> <p>5 subjects aren't terms of art; isn't that correct?</p> <p>6 MR. FLEMING: Objection. Vague.</p> <p>7 THE WITNESS: I'll respond to that in two</p> <p>8 ways. The first --</p> <p>9 BY MS. KLIEBENSTEIN:</p> <p>10 Q. I want a yes or no.</p> <p>11 A. It's not a yes or no question, and I'll explain if</p> <p>12 you like.</p> <p>13 The first is that, as we've discussed</p> <p>14 earlier today, I have spent my professional life</p> <p>15 either working directly in the software industry,</p> <p>16 teaching software related courses in college of</p> <p>17 business and college of engineering, serving as a</p> <p>18 management consultant, and serving as an expert</p> <p>19 witness. I'm not a lay person with respect to the</p> <p>20 software industry. There are many -- there are</p> <p>21 many industries where I am a lay person. So</p> <p>22 that's the first reason.</p> <p>23 The second factor is that I'm not here to</p> <p>24 do contract interpretations. I'm here to take</p> <p>25 what is agreed to by the parties and look at the</p>



<p style="text-align: right;">Page 130</p> <p>1 actions relative -- of the parties relative to</p> <p>2 customs and practices in the industry as well as</p> <p>3 the course of performance by the parties through</p> <p>4 the initial agreement in 2006 all the way through,</p> <p>5 and is that consistent with what one sees.</p> <p>6 So the language, the clauses I'm not</p> <p>7 commenting about that, except I read them and say</p> <p>8 okay, again, devil is in the details. How was</p> <p>9 this implemented? What were the actions of the</p> <p>10 party relative to the industry and relative to</p> <p>11 their own behaviors and actions? That's what I am</p> <p>12 doing in this matter.</p> <p>13 Q. So to confirm, when you were developing your</p> <p>14 opinions, when you first read the language, the</p> <p>15 clauses in the contracts, you approached that by</p> <p>16 taking a plain meaning, plain reading of the</p> <p>17 terms; correct?</p> <p>18 MR. FLEMING: Objection. Vague.</p> <p>19 THE WITNESS: I don't understand your</p> <p>20 question. I -- when I read the agreements, I -- I</p> <p>21 read them multiple times, but I looked at the</p> <p>22 agreements in the context of all of the evidence</p> <p>23 in this matter relative to the overall customs and</p> <p>24 practices in the industry.</p> <p>25 BY MS. KLIEBENSTEIN:</p>	<p style="text-align: right;">Page 132</p> <p>1 question was: Is the word territory, kind of like</p> <p>2 the word CPU, a term of art in the software</p> <p>3 licensing industry?</p> <p>4 MR. FLEMING: Objection. Vague.</p> <p>5 THE WITNESS: I would say CPU is. Because</p> <p>6 if we were to walk out of here and go up to</p> <p>7 someone on the street and say what is CPU, they</p> <p>8 would look at us with a question mark, unless they</p> <p>9 are familiar with the software industry. By</p> <p>10 contrast, I think territory is a common English</p> <p>11 word, territory, but then with respect to a</p> <p>12 license agreement, you need to go further.</p> <p>13 BY MS. KLIEBENSTEIN:</p> <p>14 Q. In developing your opinions, what impact, if any,</p> <p>15 did you give the placement of the word territory</p> <p>16 in the June 30th, 2006 license agreement?</p> <p>17 A. I don't understand your question. I look at the</p> <p>18 agreements from a holistic perspective. It's the</p> <p>19 four corners of the documents. I then look at</p> <p>20 that in the context of customs and practices.</p> <p>21 Q. Right. My question is: Did it matter to you in</p> <p>22 developing your opinions that the word territory</p> <p>23 is under Section 1 definitions instead of Section</p> <p>24 2.1? Did that matter to you?</p> <p>25 A. Well, first of all, what matters to me is that the</p>
<p style="text-align: right;">Page 131</p> <p>1 Q. Is the term territory a term of art in the</p> <p>2 software licensing industry? Let me ask that</p> <p>3 again. Is the word territory a term of art in the</p> <p>4 software licensing industry?</p> <p>5 A. It is typical in the software industry to have</p> <p>6 license agreements that provide a scope of rights.</p> <p>7 It is typical within that scope of rights to limit</p> <p>8 geography -- by geography their use of the</p> <p>9 software, and I know you've been going back and</p> <p>10 forth between use and installation, and we can</p> <p>11 talk more about that later, but you'd have to look</p> <p>12 at each agreement, and there is -- within the</p> <p>13 scope of rights granted, it is typical to provide</p> <p>14 limitations on a variety of issues.</p> <p>15 There may be no limitations on geography,</p> <p>16 but we see here there may be other limitations on</p> <p>17 geography where I've seen other agreements. It</p> <p>18 all depends on the licensor's views as to what</p> <p>19 metrics they want to use and the licensee whether</p> <p>20 they agree to them. This is enterprise licensing,</p> <p>21 not consumer licensing, not small, medium-sized</p> <p>22 business licensing where you take it or forget it.</p> <p>23 Enterprise is negotiating.</p> <p>24 Q. Setting aside whether a territorial scope is</p> <p>25 common in the software licensing industry, my</p>	<p style="text-align: right;">Page 133</p> <p>1 rights in Amendment 2 specifically call out an</p> <p>2 enterprise-wide license, and that FICO was well</p> <p>3 aware that Federal had offices and facilities</p> <p>4 outside of the United States, and there are</p> <p>5 multiple examples of that as we talked throughout</p> <p>6 this afternoon.</p> <p>7 Second is as Mr. Wachs testified he would</p> <p>8 have expected -- see if I may quote him in his</p> <p>9 deposition. He agreed when he testified he would</p> <p>10 have expected to see the license grant section</p> <p>11 reference territory.</p> <p>12 So from my perspective as someone who has</p> <p>13 been involved in the software industry, who has</p> <p>14 negotiated and been involved in negotiations over</p> <p>15 scores of license agreements and other agreements</p> <p>16 between parties, and have been an expert witness,</p> <p>17 and I emphasize, again, there is an enormous</p> <p>18 difference between serving as an expert witness in</p> <p>19 a software implementation case, or a software</p> <p>20 trade secret case, or a copyright case, or a</p> <p>21 patent case where you're going to be looking at</p> <p>22 the agreements, for example, an NDA in trade</p> <p>23 secret case, or (mumbling), there's enormous</p> <p>24 difference in doing at that kind of work and</p> <p>25 actually looking and serving as a licensing</p>



<p style="text-align: right;">Page 134</p> <p>1 expert. Big difference.</p> <p>2 My perspective, again, as a consultant and</p> <p>3 as an expert witness, as someone who has taught</p> <p>4 courses that talked about licensing is this is in</p> <p>5 the words -- this agreement in the words of the</p> <p>6 licensing executive society is what's called</p> <p>7 dreadful drafting. In other words, the -- the</p> <p>8 drafter of this agreement, which is FICO, should</p> <p>9 have called out -- if they wanted to have a</p> <p>10 territory limitation under the license grants,</p> <p>11 they should have called it out under Section 2,</p> <p>12 the license grant. They did not do so. There</p> <p>13 have been two amendments. They could have been</p> <p>14 more specific with the amendments.</p> <p>15 Additionally -- so they could have -- they</p> <p>16 being FICO could have called this out. They</p> <p>17 didn't do so, and since it's not called out, and</p> <p>18 since we see Amendment 2 is a global license, and</p> <p>19 -- enterprise license, and we know Federal is</p> <p>20 global, and there is no call out in these</p> <p>21 agreements, again, from my experience, I'm not a</p> <p>22 lawyer, I'm not giving contract interpretation,</p> <p>23 but when I'm looking at these agreements, if it</p> <p>24 was my company, I'd say, okay, specifically this</p> <p>25 means the following.</p>	<p style="text-align: right;">Page 136</p> <p>1 Q. I asked you for a yes or no.</p> <p>2 MR. FLEMING: Don't interrupt.</p> <p>3 THE WITNESS: The LES publishes materials</p> <p>4 on licensing, and when you have this kind of</p> <p>5 agreement that has -- doesn't call out what</p> <p>6 territory is in the license agreement, that's an</p> <p>7 example of dreadful drafting. You want to avoid</p> <p>8 ambiguity, and as I testified to a few moments --</p> <p>9 MS. KLIEBENSTEIN: Now we're beyond the</p> <p>10 question.</p> <p>11 BY MS. KLIEBENSTEIN:</p> <p>12 Q. Can you provide me with any treatises or articles</p> <p>13 that state placing a territorial limitation in the</p> <p>14 definitions section of a license agreement means</p> <p>15 there's no territorial limitation? Any learned</p> <p>16 treatises on that?</p> <p>17 A. I'll respond to that in two ways. First, and most</p> <p>18 important, whether or not the territory limitation</p> <p>19 should or shouldn't be below the definitions will</p> <p>20 be a decision made by the trier of fact. That's</p> <p>21 first. All I can do is provide my expert opinion</p> <p>22 based on my knowledge, training, and expertise,</p> <p>23 and skills.</p> <p>24 I referenced before the Licensing Executive</p> <p>25 Society. If you go to their books, or you can</p>
<p style="text-align: right;">Page 135</p> <p>1 I would give examples in the agreements so</p> <p>2 there's no misunderstanding later. No ambiguity.</p> <p>3 You want to be very clearcut; this is an example,</p> <p>4 this is not an example, this works, this doesn't</p> <p>5 work. Doesn't say that.</p> <p>6 Amendment 2 doesn't say it says an</p> <p>7 enterprise-wide license. That's what it says. We</p> <p>8 -- and the plain meaning of that, but if it was my</p> <p>9 agreement, again, this is from a business</p> <p>10 standpoint, I'd hand it to counsel and say paper</p> <p>11 it and make it work, and by the way, I serve as a</p> <p>12 consultant to companies --</p> <p>13 Q. There's no pending question.</p> <p>14 A. I'm just saying -- okay.</p> <p>15 Q. So that answer you just gave is that based on a</p> <p>16 plain reading of the contract or your experience</p> <p>17 in drafting agreements?</p> <p>18 A. First, I don't draft agreements. I negotiate</p> <p>19 agreements. The drafting is done by counsel. So</p> <p>20 you'll need to rephrase your question.</p> <p>21 Q. That opinion was it based on your plain reading of</p> <p>22 the contract or not; yes or no?</p> <p>23 A. It's based on my -- again, I'm a member of the</p> <p>24 Licensing Executive Society. I serve on committee</p> <p>25 of the LES. It's based on material --</p>	<p style="text-align: right;">Page 137</p> <p>1 even go to Clausen's book, which Mr. Hilary used,</p> <p>2 or David Tolan's book, there are multiple books,</p> <p>3 and you will find consistent the issue of avoiding</p> <p>4 ambiguity, providing examples.</p> <p>5 So there are -- and I'm -- let me -- I'm</p> <p>6 uncomfortable with the word learned treatises.</p> <p>7 These are source materials. I don't think -- I'd</p> <p>8 be uncomfortable with the label learned treatises.</p> <p>9 It's not from -- maybe the LES does because it's</p> <p>10 an organization of licensing professionals.</p> <p>11 Individual books find some issues with that, but</p> <p>12 we'll say they are good. No issue about that.</p> <p>13 Avoid ambiguity. Provide examples. If you</p> <p>14 don't, you run into issues like what we're seeing</p> <p>15 here today, but the decision as to whether or not</p> <p>16 this issue of territory matters will be made by</p> <p>17 the trier of fact.</p> <p>18 Q. So you would agree then that the statements you</p> <p>19 just made on the record are not the proper subject</p> <p>20 of expert testimony?</p> <p>21 A. No. The proper subject of expert testimony will</p> <p>22 be to look at the evidence, and then the expert,</p> <p>23 she or he, looks at the evidence in context of</p> <p>24 their had knowledge, skill, training, experience,</p> <p>25 education, and then provides an opinion.</p>



<p style="text-align: right;">Page 138</p> <p>1 My opinion is not whether or not territory</p> <p>2 appears in one place or other places I reference</p> <p>3 it. My opinion is that it was commercially</p> <p>4 unreasonable for FICO to know about Federal's use</p> <p>5 of Blaze Advisor on an enterprise-wide license</p> <p>6 outside of the United States. There are multiple</p> <p>7 documents that indicate that.</p> <p>8 My opinion is that it's commercially</p> <p>9 unreasonable for FICO to come forward as part of</p> <p>10 the negotiations and claim this was a breach when</p> <p>11 FICO knew well -- knew for years how Federal was</p> <p>12 using the software. That's one of my opinions as</p> <p>13 expressed in my report in a more articulate way</p> <p>14 than I just stated. So I'll reference you to my</p> <p>15 report.</p> <p>16 Q. In Paragraph 79, you write, "While the term</p> <p>17 territory is defined in the June 2006 agreement,</p> <p>18 Section 1 in the definitions, it was never used in</p> <p>19 the agreements nor any of the amendments."</p> <p>20 Is it -- is it your opinion that the</p> <p>21 definitions are not part of the contract between</p> <p>22 Federal and FICO?</p> <p>23 A. It's my opinion, as we've just gone through, that</p> <p>24 if FICO wanted to use territory as a limitation --</p> <p>25 Q. That wasn't my question.</p>	<p style="text-align: right;">Page 140</p> <p>1 As to whether or not the contract and</p> <p>2 territory, which is a subject of dispute between</p> <p>3 the parties -- I'm an independent third party.</p> <p>4 Doesn't matter to me how this comes out. That</p> <p>5 will be the subject by the trier of fact. All I</p> <p>6 can do is provide perspective of customs and</p> <p>7 practices in the industry, and I referenced the</p> <p>8 Licensing Executive Society. I referenced even</p> <p>9 the books by your own expert, which say avoid</p> <p>10 ambiguity, provide examples, which was not done by</p> <p>11 FICO in the agreements.</p> <p>12 Q. Moving on to Section B on Page 30, do you agree</p> <p>13 that in January of 2016 Chubb and Sons signatory</p> <p>14 to the license agreement underwent a change of</p> <p>15 control?</p> <p>16 A. Yes. From my understanding. Not an attorney.</p> <p>17 I've not reviewed the merger document.</p> <p>18 Q. Do you have an opinion in your report -- it wasn't</p> <p>19 clear to me. Do you have an affirmative opinion</p> <p>20 as to whether or not Chubb and Son breached</p> <p>21 Section 10.8 of the agreement with that change of</p> <p>22 control?</p> <p>23 A. I'll respond to that two ways. First, the</p> <p>24 decision as to whether or not it was a breach will</p> <p>25 be made by the trier of fact. Second, you have to</p>
<p style="text-align: right;">Page 139</p> <p>1 MR. FLEMING: Okay. We're going to have to</p> <p>2 handle this in some other way. You cannot</p> <p>3 interrupt him when he's answering.</p> <p>4 MS. KLIEBENSTEIN: He's got to answer the</p> <p>5 question.</p> <p>6 MR. FLEMING: You're going to have to do</p> <p>7 something other than interrupt him when he's</p> <p>8 answering a question. You have to give him an</p> <p>9 opportunity to respond.</p> <p>10 THE WITNESS: Please ask your question</p> <p>11 again.</p> <p>12 BY MS. KLIEBENSTEIN:</p> <p>13 Q. In Paragraph 79, the term territory -- in</p> <p>14 Paragraph 79 you write, "While the term territory,</p> <p>15 Section 1, definition, it is never used in the</p> <p>16 agreements nor any of the amendments."</p> <p>17 Is it your opinion that the definitions set</p> <p>18 forth in the software license agreement between</p> <p>19 the parties are not part of the contract?</p> <p>20 A. It's my opinion --</p> <p>21 Q. Just looking at the four corners of the contract.</p> <p>22 A. -- which is stated in Paragraph 79, if you read</p> <p>23 the remainder of Paragraph 79, this is not</p> <p>24 consistent with industry customs or practices in</p> <p>25 software licensing.</p>	<p style="text-align: right;">Page 141</p> <p>1 look at all of Section 10.8, and in order for the</p> <p>2 breach to have occurred, you also have the</p> <p>3 language and client shall make no expanded use.</p> <p>4 My opinion then on the Paragraph 93 cites</p> <p>5 Mr. Sawyer of FICO saying that there was no</p> <p>6 expanded use. So in my mind, in order for there</p> <p>7 to be the grounds for -- again, this is an</p> <p>8 example. Whether or not there was a breach will</p> <p>9 be determined by the trier of fact. However</p> <p>10 FICO's actions were commercially unreasonable with</p> <p>11 respect to, as I mentioned earlier, there's</p> <p>12 another example of the commercially unreasonable</p> <p>13 actions, which is there was no expanded use of the</p> <p>14 Fair Isaac products by Federal.</p> <p>15 So even with the change in control, it's an</p> <p>16 and in my reading of 10.8, and the and was no</p> <p>17 expanded use, which I discuss in Paragraph 92 in</p> <p>18 my report, as well as the paragraphs that follow.</p> <p>19 Q. So if the decision as to whether or not there is</p> <p>20 -- is a breach of 10.8 is a decision for the trier</p> <p>21 of fact, why are you giving any opinions as to the</p> <p>22 -- the presence of an and in 10.8?</p> <p>23 A. My opinion is not the presence of the and. My</p> <p>24 opinion is there was no expanded use and the</p> <p>25 language in Section 10.8.</p>



<p style="text-align: right;">Page 142</p> <p>1 To give -- let's think about this. As an  2 independent third party looking at Section 10.8,  3 this is relating to the written consent of the  4 parties. Since there was no expanded use, Federal  5 did not need to get written consent because they  6 were not violating the provisions of Section 10.8.  7 This, again, is a subject that the trier of  8 fact will decide. The two parties disagree on it.  9 All I can say is that in my perspective as  10 an independent expert read the language. There's  11 no expanded use. Well, I'm looking. Was there  12 expanded use? There's Mr. Sawyer saying there's  13 no expanded use, and in fact, as I discuss later  14 in the report, use actually went down in some  15 places.  16 Q. So you just mentioned that use went down in some  17 places. Are you aware that use went up in other  18 places?  19 A. Well, it's curious about that because this ties  20 into another part of the report, and that is the  21 best way, and in my view, given customs and  22 practices in the industry, for FICO to have  23 determined if there was expanded use would have  24 been to do an audit. FICO chose not to do an  25 audit.</p>	<p style="text-align: right;">Page 144</p> <p>1 after the merger. Question, "For clarity, after  2 the merger, I had," -- excuse me. His answer,  3 "For clarity, after the merger, I had no evidence  4 supplied to me that would indicate that Federal  5 used the product in an expanded way."  6 BY MS. KLIEBENSTEIN:  7 Q. Would your opinion on Section 10.8 change if you  8 learned that Federal had expanded use of the Fair  9 Isaac products after the merger?  10 MR. FLEMING: Objection. Foundation.  11 Time, place.  12 THE WITNESS: My opinion as to FICO taking  13 commercially unreasonable actions would remain the  14 same. Because 10.8 also ties into which would not  15 be unreasonably withheld, and there was no  16 justifiable reason why FICO -- even though Federal  17 didn't need consent, because there was no expanded  18 use, but if FICO -- let's just assume that you can  19 show material expanded use, not a little bit but  20 material expanded use, there is no justification  21 for unreasonably withholding.  22 Again, focusing on customs and practices,  23 if, for example, in a change of control, typically  24 you see this -- very common. The provision -- I  25 have no issue with the provision in the agreement</p>
<p style="text-align: right;">Page 143</p> <p>1 So I looked at the evidence that was  2 provided, and I've not seen anything from Mr.  3 Hilliyer, or Mr. Zoltowski, or Mr. -- I forget,  4 started with a W, Mr. Whitman or something. I've  5 not seen anything in there which would indicate  6 expanded use from the data side. What I have seen  7 is evidence from Federal, which is referenced in  8 my report, which was an interrogatory response by  9 Federal. That's on Page 39 of my report. So  10 there was not expanded use.  11 Q. So your opinions --  12 A. Again, Mr. Sawyer from FICO testified to that.  13 There was no expanded use.  14 Q. And do you recall Mr. Sawyer's testimony was about  15 expanded use at the time of the merger; correct?  16 A. Actually, his testimony is he did not know of any  17 expanded use by Federal --  18 (Whereupon the reporter asked the witness  19 to speak up.)  20 THE WITNESS: After the --  21 (Whereupon the reporter asked the witness  22 to speak up.)  23 THE WITNESS: I'm sorry. Paragraph 93,  24 FICO's Mr. Sawyer testified at his deposition that  25 he did not know of any expanded use by Federal</p>	<p style="text-align: right;">Page 145</p> <p>1 agreements. No issue. It's very common, but you  2 see this when, for example, a competitor is buying  3 the company, then the licensor says no, or if the  4 licensor has got a business justification.  5 Instead, and I discuss this in my report,  6 Paragraph 96, FICO, if they believe consent was  7 needed, it had other readily available options  8 such as simply granting an assignment that limited  9 the use of Blaze to no more than what Federal had  10 used prior to the merger. There you go. It would  11 have worked.  12 So if -- again, I've not seen expanded use.  13 No reason to ask for content, but if there is  14 material expanded use, then consent could have  15 provided. Because when we see the consent clause,  16 a competitor, but there's no justifiable business  17 reason to withhold consent. They could have done  18 -- they being FICO could have done this  19 differently.  20 BY MS. KLIEBENSTEIN:  21 Q. Did a competitor of FICO buy Federal?  22 A. No.  23 Q. Taking the material expanded use concept, is it in  24 your opinion material expand use never a  25 justification for withholding consent?</p>



<p style="text-align: right;">Page 146</p> <p>1 MR. FLEMING: Objection. Vague. Lack of 2 foundation. 3 THE WITNESS: It depends on the specific 4 situation. We can't have broad generalizations. 5 We can bring those generalizations into context 6 given our expertise overall, knowledge, skill, 7 training, education, experience, so I'll broadly 8 call it expertise going forward, and that there 9 you look at was there expanded use. 10 I've seen no evidence of expanded use. 11 FICO's own witness said there was no expanded use. 12 If you have examples of expanded use, please 13 produce them, and if so, I'll certainly consider 14 it in my opinions. 15 I did not see that in Mr. Hillier's report 16 nor in the reports of your other experts. 17 BY MS. KLIEBENSTEIN: 18 Q. So to ask it a different way, if there was 19 material expanded use, there may be justification 20 for withholding consent? 21 MR. FLEMING: Objection. Vague, and 22 foundation. Time, place. 23 THE WITNESS: I would need more information 24 there. Again, it's -- it would be between FICO 25 and Federal to work out an agreement between the</p>	<p style="text-align: right;">Page 148</p> <p>1 to have change of control, and you have to have 2 expanded use, but there was not expanded use so 3 therefore there was no need to ask for consent. 4 As someone who has been a senior manager of 5 software companies, I would read this and say I 6 need to talk to my lawyers about this. Although I 7 probably would, but there's no expanded use. So 8 then -- but if we assume -- next step. You've 9 asked to assume there was material expanded use. 10 Then we've gone deeper. What kind of expanded 11 use? How was it done, and what would be the 12 business justification for FICO to turn down the 13 consent? What's the reason? Okay. Business 14 justification, fine, and then the licensee could 15 say, okay, we get it, we disagree, and the parties 16 can negotiate. 17 Q. So your opinions regarding Section 10.8 are based 18 on your belief that written consent from FICO was 19 only needed if there was expanded use? Did I get 20 that right? 21 A. And change of control. 22 Q. And change of control? 23 A. Correct. 24 Q. And so if the court rules that that interpretation 25 is wrong, your opinions on 10.8 have no relevance;</p>
<p style="text-align: right;">Page 147</p> <p>1 parties, but that's a hypothetical. So you would 2 need to really give me more, if you will, 3 assumptions with the hypothetical. 4 If there's -- if there is material expanded 5 use, where, how, and what way, is this a 6 short-term event, is it long-term, well then, the 7 parties should sit down and redo their agreements. 8 You get what you pay for. So the idea of 9 that, again -- but there was no expanded use. We 10 -- you've not produced any evidence of that. 11 I'll repeat myself. If you have, please 12 let me see it. I'll certainly take it into 13 consideration, and if appropriate will revise my 14 opinions, but as it stands right now, I'll stand 15 by the opinions in my report as to FICO's actions 16 relative to the industry customs and practices 17 that are commercially unreasonable. 18 BY MS. KLIEBENSTEIN: 19 Q. Is it your opinion under 10.8 that FICO had to 20 provide consent otherwise they were being 21 unreasonable? Is it that black and white? 22 A. No. It's my opinion -- we have to go through some 23 steps here. It's my opinion that if -- reading 24 the language, again, from customs and practices. 25 I'm not giving contract interpretation. You have</p>	<p style="text-align: right;">Page 149</p> <p>1 correct? 2 MR. FLEMING: Objection. Lacks foundation. 3 THE WITNESS: No. No. The court will 4 ultimately decide my opinions, but again, 10.8 5 includes other issues. One is if we assume 6 expanded use, and I -- I'm repeating myself, FICO 7 has not produced that evidence. FICO had had a 8 chance to do an audit and chose not to do an 9 audit. So I've not seen that evidence. 10 Second, FICO's own witness said there was 11 no expanded use. 12 My opinion it's commercially unreasonable 13 to withhold consent without any business 14 justification, but there may be business 15 justification by FICO. I've not seen any evidence 16 of FICO saying we can't do this because of the 17 following and then discussions occur. Haven't 18 seen that. 19 If you've got that evidence, please produce 20 it. I'll take it into consideration in my 21 opinions, and then tied in with 10.8, and broadly, 22 as I discuss on Section 2 beginning on Page 31, 23 the termination by FICO was inappropriate. 24 Because -- as I discuss in Paragraphs 95 through 25 98. As well as elsewhere in the report.</p>



<p style="text-align: right;">Page 150</p> <p>1 Q. During what time frame did you investigate 2 expanded use? 3 MR. FLEMING: Object. Vague. 4 THE WITNESS: I investigated the evidence 5 that was produced in this case regarding use. I 6 referenced you to Exhibit 16 in my report, which 7 is FICO's -- Federal's response to FICO's 8 discovery request. I also referenced you to -- 9 well, back up. 10 I then -- again, all the evidence I've 11 seen, evidence has been that there was no expanded 12 use. I have not seen any examples of expanded 13 use. If you have the evidence, please provide it 14 to me. 15 BY MS. KLIEBENSTEIN: 16 Q. Did you ask for an independent audit on expanded 17 use from Federal? 18 A. I don't understand your question. 19 Q. Did you ask Federal to audit its own use of Blaze 20 Advisor and provide you with the results? 21 A. Exhibit 16. It was an interrogatory response, 22 discusses the number of realtime transactions, the 23 average per month, and the average per day. This 24 came from Federal, this being response to FICO's 25 discovery request Number 89.</p>	<p style="text-align: right;">Page 152</p> <p>1 Exhibit 16? 2 A. I'll respond to that in two ways. The first is 3 you're the moving party with respect to this 4 matter. If you want to make the argument that 5 there was expanded use, I will respond to it with 6 the data and evidence you provide. 7 Again, I was not asked within the scope of 8 my work to review Federal's exact specific use. 9 What I do have is the evidence given, which is Mr. 10 Sawyer saying there was no expanded use. As I've 11 said now, this will be the fourth time, if you 12 feel there was expanded use, provide me the 13 evidence. 14 My second comment is that looking over Mr. 15 Waid's deposition testimony both days when he did 16 the initial pricing he had that information, but 17 he did not disclose it in sufficient detail in his 18 pricing analysis, and I talked about that earlier 19 today as well. 20 Q. So your opinions on expanded use are based on the 21 license agreement between the parties, and the 22 documents, and deposition testimony in this case; 23 correct? 24 A. There's other information. For example, documents 25 in the case I reference in the report about how --</p>
<p style="text-align: right;">Page 151</p> <p>1 Q. And what's the date of the information from 2 Exhibit 16? 3 A. I'll note please, if you turn to Page 38, Footnote 4 45 it states -- because it's more than just what I 5 have in Exhibit 16, "There are other interrogatory 6 responses from Federal that provide information 7 regarding use of Blaze to Federal. See 8 interrogatory response 19 dated February 28, 2019, 9 interrogatory response 20 dated February 28, 2019, 10 interrogatory response 6 dated March 21, 2019, and 11 interrogatory response 16 and 17 dated March 21, 12 2019." 13 So you've got those interrogatory 14 responses. Those were provided in Q1 2019 based 15 on use of Blaze Advisor by Federal. 16 As to the timeline, I would need to speak 17 with someone at Federal to find that out. 18 Q. And did you compare that data in Exhibit 16 to the 19 same data from 2016? 20 A. Where is the data from 2016 that you're 21 referencing? Are you -- are you referencing Mr. 22 Waid's work? 23 Q. No. I'm referencing -- I haven't seen data from 24 2016 either. I'm just asking did you ask for data 25 from 2016 to be able to compare it to the data in</p>	<p style="text-align: right;">Page 153</p> <p>1 if you turn to Paragraph 123, ADAPT in Australia 2 went from 26 million in premium volume in 2014 to 3 just 4 million in 2018. I reference in Paragraph 4 121 the EZER application in combination with Blaze 5 was used a total of four policies of \$15,000. 6 So there are some examples where you see 7 use going down. I've not seen examples of use -- 8 material use going up, I've not seen that from 9 your witnesses or in your filings, and you being 10 FICO could have done an audit back when you had 11 these negotiations that FICO felt -- again, 12 putting myself in the shoes of a licensor, if my 13 company feels there was expanded use, or any other 14 reason that's relevant to a pending litigation 15 potential, I would say let's do the audit. You 16 have the right to do the audit. You didn't do it. 17 Q. Did you, while you're preparing your opinions, 18 ever ask Federal if there were any documents or 19 other evidence that showed use went up? 20 MR. FLEMING: Object as asked and answered 21 repeatedly. 22 THE WITNESS: I responded to this. I 23 looked at the documents in evidence, and given 24 that FICO said there was no expanded use, you 25 can't do 100 percent of 100 percent. FICO</p>



<p style="text-align: right;">Page 154</p> <p>1 acknowledged there was no expanded use. Okay.  2 Got it.  3 Then Mr. Zoltowski's report, Mr. Witt's  4 report, I'm mispronouncing his name, neither of  5 those discuss expanded use. Mr. Zoltowski sort of  6 implies it, and I address that material in my  7 report, but beyond that, I've not seen anything.  8 Again, I'm rebutting what your experts have  9 provided. I've not seen it. I've not seen it in  10 your filings.  11 BY MS. KLIEBENSTEIN:  12 Q. In your industry, can it ever be commercially  13 reasonable to demand additional license fees when  14 a licensee undergoes a merger or an acquisition  15 event?  16 A. Yes. Absolutely. Depends on the details, and it  17 depends on how much you ask for. It depends on  18 the negotiations and the relationship between the  19 parties.  20 Again, you got to look at the agreements.  21 If, for example, the software moves from one --  22 MR. FLEMING: Why don't you wait for the  23 next question.  24 BY MS. KLIEBENSTEIN:  25 Q. Paragraph 91. Your report states, "Parties to a</p>	<p style="text-align: right;">Page 156</p> <p>1 assuming that, again, you have a good relationship  2 that the -- that -- and you're making money on it,  3 you as a licensor, it's an ongoing relationship,  4 you have a named client, it's Tier I of value, you  5 get, again, reputational gains, marketing sales  6 gains, and other benefits that Tier I client can  7 provide information help you make better software.  8 They can serve as a beta test site for new  9 versions. Those are some examples. I can think  10 of other ones too if you give me time.  11 Q. Moving to Paragraph 102 --  12 A. Why don't you ask this one question, and then I  13 need a quick break.  14 MS. KLIEBENSTEIN: Well, why don't we take  15 a quick break now.  16 THE WITNESS: Thank you.  17 THE VIDEOGRAPHER: We are going off the  18 record. The time is 3:18 p.m. 0  19 (Whereupon a short break was taken from  20 3:18 p.m. to 3:30 p.m.) 0  21 THE VIDEOGRAPHER: We are back on the  22 record. This marks the beginning of Media 5. The  23 time now is 3:30 p.m. 0  24 BY MS. KLIEBENSTEIN:  25 Q. Doctor Kursh, moving to Paragraph 102 in your</p>
<p style="text-align: right;">Page 155</p> <p>1 software license agreement would not expect to be  2 confronted with such an unreasonable demand given  3 the above-mentioned value to software license like  4 FICO for a continuing license arrangement."  5 What are the, quote-unquote,  6 above-mentioned values?  7 A. I think you misstated Paragraph 91. If you could  8 please reread it.  9 Q. Well, let me just ask: The phrase above-mentioned  10 value to software licensors what exactly are you  11 referring to with that phrase?  12 A. Having a Tier I licensee based on recognition in  13 the industry, based on going outside of the  14 industry but peripheral industries, i.e., as we  15 talked about earlier today, provides credibility  16 to you as a licensor for your software.  17 Additionally it has been shown, and there  18 is literature on this, Ohnbing (phonetic), for  19 example, has done some great work on it. There's  20 other organizations as well. It is much less  21 expensive to keep an existing client, or with  22 respect to software licensing, that it is to get a  23 new one.  24 So in terms of the value to software  25 licensor, which every licensee is afforded,</p>	<p style="text-align: right;">Page 157</p> <p>1 report, I see that your support for Paragraphs  2 102, 103, and 104 is Mr. Harkin; is that correct?  3 A. Yes.  4 Q. Doctor Kursh, are assignment provisions or  5 anti-assignment, no assignment provisions  6 exclusive to software licenses, license  7 agreements?  8 A. I don't understand your question. I -- please  9 answer -- please ask it in a different form.  10 Q. Non-assignment provisions similar to the one we  11 saw in 10.8, in general, are non-assignment  12 provisions -- do you only find them in software  13 license agreements, or do they appear in other  14 agreements as well?  15 A. I can speak as an expert in regard to the software  16 industry, and as we discussed earlier today, my  17 expertise in the software industry. As to other  18 industries, I have some experience but not enough  19 to provide you more than specific examples. I  20 certainly -- I can say actually my experience this  21 is software, but I've seen certain rights on  22 assignments, but again, it's just in software. I  23 can't speak to other industries as I sit here.  24 Q. So you don't know one way or the other if -- if no  25 assignment provisions are exclusive to software</p>



<p style="text-align: right;">Page 158</p> <p>1 license agreements?</p> <p>2 A. Well, I -- you know, I wouldn't say they are</p> <p>3 exclusive. You would expect to see no assignment</p> <p>4 in other industries, for example, in biotech, for</p> <p>5 example, in other kinds of rights, grant -- or</p> <p>6 agreements between parties, but I wouldn't say</p> <p>7 exclusive to the software industry only because</p> <p>8 there are a lot of industries out there and a lot</p> <p>9 of different ways that companies interact.</p> <p>10 Q. Is it your opinion that it is a custom and</p> <p>11 practice in the software industry to never</p> <p>12 terminate software agreements when a licensee</p> <p>13 undergoes a change of control or merger event?</p> <p>14 A. I'm uncomfortable with the word never. The</p> <p>15 software industry has --</p> <p>16 (Whereupon the reporter asked the witness</p> <p>17 to speak up.)</p> <p>18 THE WITNESS: Uncomfortable with the word</p> <p>19 never. The software industry has gone, at a</p> <p>20 minimum, tens of thousands of companies. Never</p> <p>21 would apply to all of those so I can't answer the</p> <p>22 question. You need to rephrase it.</p> <p>23 BY MS. KLIEBENSTEIN:</p> <p>24 Q. Doctor Kursh, what is your experience in setting</p> <p>25 prices for software licenses?</p>	<p style="text-align: right;">Page 160</p> <p>1 a lot of pricing analyses.</p> <p>2 As I note earlier in my report, software is</p> <p>3 a relatively unique industry because your marginal</p> <p>4 costs are so low so we can price, you can add</p> <p>5 module, you can do a lot of other different stuff.</p> <p>6 It's understanding elasticity and demand on the</p> <p>7 part of your customers.</p> <p>8 Third, under consulting, I worked as a</p> <p>9 management consultant for numerous software</p> <p>10 companies on -- as part of the management, how</p> <p>11 does one price, how does one compensate your</p> <p>12 employees, and what kinds of products do your</p> <p>13 market competitors. So looking at that from a</p> <p>14 consulting standpoint.</p> <p>15 As an expert witness, I have dealt with</p> <p>16 pricing issues frequently. Because one looks at</p> <p>17 the prices companies charge, one looks at issues</p> <p>18 with respect to what is provided overall, again,</p> <p>19 this ties back to all the other work I did -- I've</p> <p>20 done in the past, and then finally, I teach</p> <p>21 software pricing issues in -- I taught, retired</p> <p>22 now as a professor. I talked about software</p> <p>23 pricing issues and how you value software</p> <p>24 companies. Because certainly valuation from</p> <p>25 respect of discounted cash flow is revenue minus</p>
<p style="text-align: right;">Page 159</p> <p>1 A. My experience or expertise would come from at</p> <p>2 least -- just writing to make sure I have ...</p> <p>3 would be at least five different categories where</p> <p>4 I gained my expertise. I'm going to do this</p> <p>5 chronologically.</p> <p>6 When I was in graduate school, I was -- I</p> <p>7 did well enough in marketing and marketing</p> <p>8 research in the Wharton program that I was asked</p> <p>9 to become a grader. Part of that work related to</p> <p>10 as part of marketing how does one price, what</p> <p>11 criteria one uses to price, not in software but in</p> <p>12 industries overall, for example, pricing on the</p> <p>13 basis of cost plus, pricing based on value,</p> <p>14 pricing based on most importantly fair market,</p> <p>15 willing buyers, willing sellers, along with other</p> <p>16 factors.</p> <p>17 Second, at Blackacre, when we did pricing,</p> <p>18 not only did we do pricing which varied buy</p> <p>19 products and region, I also -- and I discussed</p> <p>20 this earlier today, we pioneered in our vertical</p> <p>21 market telemarketing and direct -- direct mail</p> <p>22 marketing, and as part of that, I conducted a</p> <p>23 series of AV tests, and I can explain that if you</p> <p>24 would like, where we tested different price points</p> <p>25 and elasticity of demand. So at Blackacre, we did</p>	<p style="text-align: right;">Page 161</p> <p>1 cost. Revenue is number of licenses times average</p> <p>2 price of those licenses, varying that building</p> <p>3 Excel models where one would analyze where is the</p> <p>4 ideal price point relative to elasticity and doing</p> <p>5 an analysis.</p> <p>6 I also do a lot of reading and</p> <p>7 participation in technical events looking at</p> <p>8 issues like pricing and general management issues</p> <p>9 and so forth. So those categories as best I can</p> <p>10 recall as I sit here.</p> <p>11 Q. What sort of pricing metrics are used in the</p> <p>12 software licensing industry?</p> <p>13 A. Depends on the company.</p> <p>14 Q. Are there no generalized metrics at all?</p> <p>15 A. Oh sure there are metrics. The metrics tie into</p> <p>16 the license rights granted. So you'll be looking</p> <p>17 at issues like what metrics do you want to use, is</p> <p>18 it by location, is it by -- in the old days, we</p> <p>19 would do things like MIPS, that's long gone, but</p> <p>20 you look at transactions, you look at number of</p> <p>21 instances of the software, you would look at how</p> <p>22 many people at the same time, what's often known</p> <p>23 as seats, you look at -- and these are all issues</p> <p>24 that the licensor determines.</p> <p>25 The licensor -- I have also seen licenses</p>



<p style="text-align: right;">Page 162</p> <p>1 where licensor says, look -- for example, in one  2 software company, they provided value to the  3 licensee, and the licensor said, okay, we want a  4 percentage, and this is how it's going to be  5 calculated. It was called out in the license, and  6 that meant that the licensee didn't have to pay  7 anything.</p> <p>8 There are situations where license software  9 is -- again, these are all metrics. Licensors use  10 a whole variety of metrics. This is negotiated  11 with the licensees. Many times it's also tied  12 into the additional services and support, whether  13 you're doing configuration customization work,  14 whether you are -- these are all part of the  15 metrics, what are some metrics I've seen.</p> <p>16 Number -- what types of device, for  17 example, in retail systems, that's a license for  18 your POS, point of sale, would include tablets  19 that people use walking around the floor, what  20 about the eCommerce side, how do you it price  21 that. There are so many different metrics. It's  22 what the licensor chooses to use and licensee --  23 and again, these are enterprise licenses chooses  24 to go along with.</p> <p>25 Also term. I've seen multiple licenses</p>	<p style="text-align: right;">Page 164</p> <p>1 agreements, I can't speak to what is exactly in  2 the minds of the parties, but I can speak based  3 on, again, my expertise within the industry. So  4 sure. You can use that.</p> <p>5 Q. We talked earlier about the availability for  6 potential add-ons and the availability --  7 availability to sell consulting services. Are  8 those two additional metrics?</p> <p>9 A. Those are two. There are many other metrics as  10 well, and let's -- let's be careful here too  11 Counsel, and that is, you've got metrics that we  12 use, and then you've got negotiations as well  13 which incorporates the metrics but it considers  14 other kinds of factors like -- give you an  15 example.</p> <p>16 A licensor may say, yeah, our bench of  17 consultants which will do you the implementation  18 are really busy for the next four months. So  19 again, thinking about this from my perspective as  20 a manager, I would say, okay -- well, I would say  21 to the licensee we can do this for you at a  22 certain price point, but you're going to have to  23 wait six months. In other words, when you say  24 four months, you assume it will take longer, and  25 you want to build some in slack because you don't</p>
<p style="text-align: right;">Page 163</p> <p>1 where licensees have a specific term, two, three,  2 five years, and then they have to come back and  3 renegotiate the license. Those are some examples.  4 I can think of more if you give me time.</p> <p>5 Q. What about the size of the licensee's  6 implementation; is that a industry metric?</p> <p>7 A. I don't understand your question. What do you  8 mean by implementation and size?</p> <p>9 Q. The size -- so when the licensee is implementing  10 the software into an application to, for example,  11 the size, whether it's going to be in a very small  12 part of the company or large throughout the entire  13 company?</p> <p>14 A. You mean company being the licensee?</p> <p>15 Q. Correct.</p> <p>16 A. Okay, and what's your question?</p> <p>17 Q. Can that be a metric used in the industry to  18 assist in determining the price?</p> <p>19 A. Well, we see that in this particular situation in  20 this case. [REDACTED]  21 [REDACTED]  22 [REDACTED] This ties again  23 to our earlier discussions about how prices are  24 negotiated, and what often is on the minds of the  25 parties, at least for what I've seen in</p>	<p style="text-align: right;">Page 165</p> <p>1 want to leave licensees hanging, and so licensee  2 might say, okay, that's good, we're into that,  3 we'll take X as a price versus X times some  4 multiple, and we'll wait for it. So this is all  5 negotiated between the parties at enterprise  6 levels, not consumer, not small, medium-sized  7 businesses, enterprises.</p> <p>8 That's just one example. I can give you  9 more if you'd like.</p> <p>10 Q. And two other metrics that we discussed earlier  11 were referral possibility and the reference value  12 of the client. Would you agree that those are  13 additional metrics?</p> <p>14 A. That's part of the negotiations. Again, the  15 metrics to me are -- and the negotiation -- you  16 can -- let's -- let's talk about this.</p> <p>17 In the negotiations, and I've had this  18 happen, perspective licensees will say we'll be a  19 reference for you, and one of the things you  20 rapidly learn in the industry, like what FICO  21 does, you want to call out specifically what  22 you're expecting from the licensee.</p> <p>23 For example, licensee will say and we'll  24 even serve as a site for you enterprise to bring  25 perspective licensees to visit, they can come see</p>



<p style="text-align: right;">Page 166</p> <p>1 how we use your software. You want to be very</p> <p>2 specific and call that out so there's no</p> <p>3 misunderstanding later.</p> <p>4 As a licensee, I'll suggest to people,</p> <p>5 okay, it's great you're doing that, if you want to</p> <p>6 limit it to two visits, three visits a year, two</p> <p>7 week notice so there are no issues or surprises</p> <p>8 for your team because you have a business to run</p> <p>9 as a licensee. So this is all negotiated between</p> <p>10 the parties, and you see FICO does call that out</p> <p>11 on Exhibit ...</p> <p>12 Q. 421?</p> <p>13 A. 421. We have some of those terms, but I've seen</p> <p>14 different complementary language, but</p> <p>15 fundamentally it's you want to operationally</p> <p>16 define your understanding. You want to minimize</p> <p>17 ambiguity. Because even with the best of</p> <p>18 intentions by the parties, unless you put it in</p> <p>19 writing and operationally define and avoid as much</p> <p>20 -- and avoid ambiguity, you can have potential</p> <p>21 problems down the stream. So this ties into</p> <p>22 (mumbling) you being the licensor.</p> <p>23 Q. To follow up on one thing that you said, you</p> <p>24 mentioned a pricing structure, and I wrote down</p> <p>25 you said we want a percentage and the licensee</p>	<p style="text-align: right;">Page 168</p> <p>1 Q. So the licensor gets a piece of the revenue?</p> <p>2 A. Correct.</p> <p>3 Q. The revenue that's -- that runs through the</p> <p>4 software; correct?</p> <p>5 A. Correct, i.e., the license fee is -- the licensor</p> <p>6 gets a piece, but this is negotiated between the</p> <p>7 parties, and what the parties agree to is what are</p> <p>8 the terms of the agreement, if you will.</p> <p>9 Q. Okay. Did you do an analysis of how -- how you</p> <p>10 believe Blaze Advisor should be priced per</p> <p>11 application in this case?</p> <p>12 A. At what time?</p> <p>13 Q. Let me be more clear on that. Let's focus on the</p> <p>14 Federal applications --</p> <p>15 A. Okay.</p> <p>16 Q. -- at issue here. Did you do an analysis of how</p> <p>17 you believe those application licenses should be</p> <p>18 priced in this case?</p> <p>19 A. At what time?</p> <p>20 Q. As part of preparing your report?</p> <p>21 A. Well, if you take a look please, and this is the</p> <p>22 entire section now labeled Section C, FICO's</p> <p>23 demands for license fees ignores Federal's actual</p> <p>24 use of Blaze, and I then go through several</p> <p>25 factors, and what you see there is in there</p>
<p style="text-align: right;">Page 167</p> <p>1 doesn't have to pay anything?</p> <p>2 A. Up front for the license.</p> <p>3 Q. I don't understand that framework. Can you</p> <p>4 explain it for me?</p> <p>5 A. Yeah. Sure. There are software companies, for</p> <p>6 example, that will -- I'll give you an example.</p> <p>7 The -- a company which provides billing and</p> <p>8 administration services for transportation</p> <p>9 authorities on highways, and what they will</p> <p>10 typically do is they will provide the software and</p> <p>11 the services to manage that billing, and in</p> <p>12 return, they get a piece of it, but they don't --</p> <p>13 the -- the municipality rarely pays money.</p> <p>14 The same way, for example, I don't know how</p> <p>15 the State of Minnesota works, but in other states</p> <p>16 where you do corporate filings and other</p> <p>17 documents, you can choose to pay with a credit</p> <p>18 card, and there's a fee attached. Well, the</p> <p>19 company providing those payment services gets a</p> <p>20 piece of that fee, and the government agency</p> <p>21 typically doesn't pay a license fee.</p> <p>22 Same thing with parking applications.</p> <p>23 Those are examples where municipalities -- and</p> <p>24 I've seen this kind of licensing pricing in other</p> <p>25 environments as well.</p>	<p style="text-align: right;">Page 169</p> <p>1 turning to Page 39, as well as my -- one of the</p> <p>2 reasons I'm asking you about the time is that Mr.</p> <p>3 Waid provided certain sizing of applications at</p> <p>4 the time of the license, and this is covered in</p> <p>5 Paragraph 114. If CSI Express was a small app</p> <p>6 according to FICO when they originally licensed</p> <p>7 Blaze for it, then using it as a proxy for other</p> <p>8 Fed apps, I can estimate sizes.</p> <p>9 So based on the data number of uses by</p> <p>10 Federal, the data that, again, Mr. Waid</p> <p>11 considered, and what we see -- I'll go two places</p> <p>12 now. First is the sizing by Mr. Waid, as I talked</p> <p>13 earlier today, is inconsistent. How he sized</p> <p>14 applications when the initial license, and then</p> <p>15 how he sized them in an interrogatory response,</p> <p>16 and then how he gave that data to Mr. Zoltowski,</p> <p>17 which Neil then used in his report, they are</p> <p>18 different.</p> <p>19 If you're using the same model to price,</p> <p>20 they should all be the same, but they are</p> <p>21 different.</p> <p>22 So in my analysis beginning in Paragraph</p> <p>23 115, I looked at CSI Express using the metric</p> <p>24 based on Mr. Waid's original methodology and then</p> <p>25 found that these were, as you can see in Exhibit</p>



<p style="text-align: right;">Page 170</p> <p>1 17, small, with the exception of commercial</p> <p>2 underwriting workstation, medium.</p> <p>3 So that's what I did, and I talk about</p> <p>4 Exhibit 18 compared to the interrogatory response</p> <p>5 from FICO.</p> <p>6 Q. In performing this pricing analysis, what was the</p> <p>7 -- what was the evidence that you relied on?</p> <p>8 A. [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 172</p> <p>1 transactions, this is response Number 89, it shows</p> <p>2 the number of transactions. Excuse me.</p> <p>3 Q. So in developing your --</p> <p>4 A. Excuse me. There may be other documents I looked</p> <p>5 at in doing this work. I don't recall as I sit</p> <p>6 here, but there may be other ones.</p> <p>7 Q. Are you assuming that CSI policy renewal, as</p> <p>8 mentioned in Exhibit 13, is the same as CSI</p> <p>9 Express listed in Exhibit 16?</p> <p>10 A. I'm assuming, if you go back to, as best I can</p> <p>11 recall, Mr. Waid's original sizing, and then the</p> <p>12 interrogatory response, CSI Express in the</p> <p>13 interrogatory response is listed as medium, and if</p> <p>14 you see FICO's second supplementary answers, CSI</p> <p>15 Express was small when FICO sold the deal. It was</p> <p>16 medium when -- I'm referencing Paragraph 117. It</p> <p>17 was medium when FICO submitted the interrogatory</p> <p>18 responses, and it -- and in Mr. Waid's deposition,</p> <p>19 and then it was large with Mr. Zoltowski.</p> <p>20 These are all examples of FICO not</p> <p>21 providing a methodology that is reliable and be</p> <p>22 replicated on their pricing, and I used the data</p> <p>23 available to me to size the applications.</p> <p>24 Q. It's your opinion that the 2006 sizing for CSI</p> <p>25 Express was small; is that right?</p>
<p style="text-align: right;">Page 173</p> <p>1 [REDACTED] n.</p> <p>2 If you've got other evidence, as I</p> <p>3 mentioned earlier, please provide, and I'll</p> <p>4 reconsider.</p> <p>5 Q. Let's focus on the application based pricing</p> <p>6 first. Is it correct that your starting point for</p> <p>7 your application based pricing was a 2006 e-mail</p> <p>8 of -- in Exhibit 13 of your report?</p> <p>9 A. Exhibit 13 is part of it. What I know is that</p> <p>10 fees, license fees were paid by Federal at the</p> <p>11 time of the licensing in 2006. I don't know if</p> <p>12 the document you provided me, 314, has a schedule.</p> <p>13 Exhibit A of Exhibit -- Deposition Exhibit 314 --</p> <p>14 actually, we didn't label this so I'll just</p> <p>15 reference it by the Bates number, FICO 002 --</p> <p>16 0002286, this is the Blaze Advisor development</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 So that's where I got that. I verified</p> <p>23 with this in the e-mail with what was in the</p> <p>24 license, and the e-mail talks about it in small.</p> <p>25 Additionally if you look at the number of</p>	<p style="text-align: right;">Page 173</p> <p>1 A. Per Mr. Waid. Yes.</p> <p>2 Q. Per Mr. Waid?</p> <p>3 A. Excuse me --</p> <p>4 Q. Where does Mr. Waid say that?</p> <p>5 A. It was not per Mr. Waid -- well, it is actually.</p> <p>6 Mr. Waid per his deposition did the pricing on the</p> <p>7 initial license. Then what I see is Exhibit 13.</p> <p>8 I also see the license agreement which calls out</p> <p>9 [REDACTED].</p> <p>10 Q. Is CSI -- is CSI policy renewal, which I see in</p> <p>11 Exhibit 13, do you know for a fact that that is</p> <p>12 the exact same as the CSI Express application?</p> <p>13 A. I don't recall as I sit here that that is exactly</p> <p>14 the same.</p> <p>15 Q. And at the time of the 2006 agreement, did anyone</p> <p>16 at FICO size the DecisionPoint application?</p> <p>17 A. It's my understanding that Mr. Waid came up with</p> <p>18 the pricing on the initial license along with</p> <p>19 conversations with other FICO personnel.</p> <p>20 If you look and try to replicate using the</p> <p>21 specific kinds of criteria on applications, using</p> <p>22 the nine factor grid, you will find that sizing</p> <p>23 will discharge as a license fee is about one-third</p> <p>24 of what the application grid comes up with.</p> <p>25 So it is my opinion that Mr. Waid did that,</p>



<p style="text-align: right;">Page 174</p> <p>1 and that there is not a -- there's not using a 2 rigorous methodology that could be replicated, and 3 if there was, I have not seen it. I have not seen 4 evidence, and if there is evidence of this 5 rigorous methodology that can be replicated, I 6 would have expected to see and have not seen from 7 FICO the model, examples of the model, and then I 8 could have replicated it, but I haven't seen it. 9 So what I'm getting at is the application 10 sizing was one factor, according to Mr. Waid most 11 important, if I may rephrase. So my answer is I 12 don't recall from Mr. Waid's deposition him 13 specifically saying that he looked at that 14 particular application. 15 Q. In 2006? 16 A. In 2006. It might be in his deposition. I don't 17 recall as I sit here. 18 Q. And I'll ask the same question for the other 19 applications that are listed in Exhibit 16; 20 Automated Renewal Process, CUW, IRMA, TAPS, 21 Premium Booking, Evolution, Adapt-ABL, and EZER? 22 A. I don't understand -- Exhibit 16 is Federal's 23 response to FICO. 24 Q. Yes. 25 A. Your question is what?</p>	<p style="text-align: right;">Page 176</p> <p>1 taking Exhibit 16, number of transactions, which 2 is 1, 2, 3, 4, 5, Columns 4 and 5, realtime 3 transactions, I then measured that against the 4 application size category, which is in the nine 5 factor grid. 6 Q. I don't mean to interrupt, but I think you're well 7 beyond the question. 8 A. Okay. I'm sorry. I don't know -- I don't know if 9 Mr. Waid -- 10 Q. Don't fret. We'll get there. So, you know, I 11 could ask you the questions for each one of these 12 application beyond CSI Express in Exhibit 16, and 13 I'd like to do it quickly as a group so we don't 14 spend 25 minutes on this point. So maybe I'll 15 just ask it a different way. 16 To your knowledge, the only application 17 that was priced specifically in 2006 was CSI 18 policy renewal; is that right? 19 A. I don't understand your question. Mr. Waid in his 20 deposition discussed how he priced Blaze Advisor. 21 I was not at his deposition. I don't recall as I 22 sit here. I have only the transcript and the 23 exhibits. I don't recall as I sit here his 24 walking through saying that he or a member of the 25 FICO team specifically priced each one of those</p>
<p style="text-align: right;">Page 175</p> <p>1 Q. In 2006 -- in 2006, did FICO size the automated 2 renewal process application? Did they size the 3 use of Blaze Advisor in the automatic -- automated 4 renewal process application in 2006? 5 A. You asked me this in context of the product. My 6 answer remains the same. I was not at FICO. All 7 I have is the evidence in this case. All I have 8 is -- particularly with respect to pricing is the 9 e-mails and Mr. Waid's deposition, there may be 10 some other elements as well, but particularly Mr. 11 Waid's deposition where he discusses the pricing 12 process, but I keep going back to Mr. Waid's 13 testimony was not, as I recall, this is exactly 14 what I did, I did step A, B, C, D for each one of 15 the applications, came out with a number. 16 So I don't recall ever seeing documents 17 that discuss in a manner how the pricing was done, 18 let alone if it was done based solely on 19 applications. 20 Based on Mr. Waid's testimony, the pricing 21 appeared to be done based on conversations he had 22 with people, and as he said in his deposition, 23 most important, number of transactions. Then I 24 took that -- looking at their grid, I looked at 25 their grid, rolled for number of transactions,</p>	<p style="text-align: right;">Page 177</p> <p>1 applications one by one using their own nine 2 factor grid and then providing examples of it. 3 Q. That was after the lawsuit was filed; correct? 4 A. The deposition happened after the lawsuit was 5 filed. 6 Q. I'm talking about the pricing that you were just 7 referring to for all the applications. That 8 occurred after the lawsuit; correct? 9 A. I don't understand your question. My 10 understanding, please correct me if I'm wrong, I 11 don't have his deposition transcript in front of 12 me, he was asked to explain how FICO priced its 13 software. 14 Q. Your pricing of the Federal applications is found 15 in Exhibit 17; is that right? 16 A. Yes. Although I -- in this entire section, but go 17 ahead. 18 Q. And you size CSI Express as small; is that right? 19 A. Yes. 20 Q. And for the other applications that fall below it, 21 you based your pricing of those applications based 22 on what you viewed as the size for CSI Express; 23 correct? 24 A. [REDACTED] 25 [REDACTED]</p>



Page 178

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 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 A. Okay, but I don't see it in the chart here in  
 7 Exhibit 16, the interrogatory response.  
 8 Q. So how can exhibit -- how can -- how can --  
 9 A. The only place you see CSI -- sorry.  
 10 MR. FLEMING: Wait for the question.  
 11 BY MS. KLIEBENSTEIN:  
 12 Q. How can Exhibit 13 then provide a basis on which  
 13 to price the CSI Express application in 2019?  
 14 A. The way to price -- Mr. Bakewell goes through his  
 15 analysis with respect to pricing. I didn't do  
 16 damages. So I think your question is more  
 17 appropriately put forth to him.  
 18 Q. In Exhibit 17, you identified CSI Express as a  
 19 small application; correct?  
 20 A. Correct. Exhibit -- right. Exhibit 17. Yes.  
 21 Q. What supports that opinion? What evidence?  
 22 A. It's my understanding, again, from Exhibit 13, and  
 23 that there is no other CSI that that is -- and  
 24 there is no example of CSI otherwise in Exhibit 16  
 25 among the applications I assumed those to be with

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1 respect to pricing the same.  
 2 Q. So you're assuming CSI policy renewal and CSI  
 3 Express are the same applications?  
 4 A. [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 Q. Do you know whether or not --  
 23 A. Made other assumptions based on the data he was  
 24 given by Mr. Waid, Mr. Zoltowski did not do any  
 25 indication -- any independent verification of that

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1 data.  
 2 Q. Doctor Kursh, my questions aren't about other  
 3 people, other opinions. My questions are about  
 4 your opinions, and my next question this. Let's  
 5 look at Paragraph 109.  
 6 Do you have any information as to the  
 7 average number per month realtime transactions  
 8 that went through this CSI application referenced  
 9 in Paragraph 109 in 2006?  
 10 A. And your question is what again please?  
 11 Q. For the CSI application from June 2006 that's  
 12 referenced in Paragraph 109, do you have any data  
 13 on the transactions that went through that  
 14 application at that time in 2006?  
 15 A. What I have is among the evidence, there may be  
 16 other evidence, that -- if you take a look at  
 17 Bates Number FICO 0002286, it states in the second  
 18 sentence, "The application currently known as CSI  
 19 Express," open paren, "which is Chubb's specialty  
 20 insurance underwriting an automated policy renewal  
 21 application and its supporting system  
 22 applications, excluding claims, point of sale data  
 23 capture, billing and marketing applications," and  
 24 [REDACTED] That's  
 25 what I used in my work.



<p style="text-align: right;">Page 182</p> <p>1 Now, if you take a look at the Blaze</p> <p>2 capability in Exhibit 16, under CSI Express, it</p> <p>3 says predictive modeling, it says underwriting</p> <p>4 guidance, and that ties into what is defined as</p> <p>5 the named application called then CSI Express.</p> <p>6 [REDACTED]</p> <p>7 Q. That wasn't my question.</p> <p>8 A. I'm sorry.</p> <p>9 Q. My question was: Do you have any data on the</p> <p>10 number of realtime transactions that went through</p> <p>11 CSI in 2006?</p> <p>12 A. I don't recall seeing any evidence in that regard</p> <p>13 as I sit here.</p> <p>14 Q. [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 A. That's correct.</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED] need to look at</p> <p>21 the discovery response, Number 89, and so I can't</p> <p>22 answer that as I sit here.</p> <p>23 Q. Isn't Exhibit 16 the discovery response to RFP 89?</p> <p>24 A. Yes. Again, I would have to look at this, and I</p> <p>25 would need -- I'll go back and look.</p>	<p style="text-align: right;">Page 184</p> <p>1 client, FICO, to exclude in his damages</p> <p>2 calculations standard price discounts, tying</p> <p>3 together licensing attributes with the merger,</p> <p>4 their own sizing methodology, enterprise versus</p> <p>5 applications. He didn't consider enterprise, and</p> <p>6 yet Mr. Waid in his own testimony says that. He</p> <p>7 ignores, again, the fact that what the license</p> <p>8 provides is a enterprise-wide license on a global</p> <p>9 basis, and he incorrectly assumes applications.</p> <p>10 It's all in my report. It's commercially</p> <p>11 unreasonable for Mr. Zoltowski based solely on Mr.</p> <p>12 Waid's work to come forward and do that damages</p> <p>13 work. As to the specifics of pricing, again,</p> <p>14 that's Mr. Bakewell's province. I'm not a damages</p> <p>15 -- I'm not providing a damages analysis in this</p> <p>16 litigation.</p> <p>17 Q. I'm trying to drill down on whether you're</p> <p>18 providing affirmative opinions on the sizing</p> <p>19 Federal applications. Are you or aren't you?</p> <p>20 A. I'm providing an affirmative opinion with the</p> <p>21 sizing of the applications which ties into the</p> <p>22 number of transactions is inconsistent by FICO</p> <p>23 throughout this litigation. It is commercially</p> <p>24 unreasonable for FICO not to provide its specific</p> <p>25 methodology that can be replicable on sizing which</p>
<p style="text-align: right;">Page 183</p> <p>1 Q. So in preparing your opinions, you did not base</p> <p>2 your opinions on the sizing data from 2019;</p> <p>3 correct?</p> <p>4 A. Actually, in preparing my opinions, I was looking</p> <p>5 at Mr. Zoltowski's report, and Mr. Zoltowski used</p> <p>6 information provided to him by Mr. Waid. As to</p> <p>7 where Mr. Waid got that information from, again,</p> <p>8 there was no discussion of that in Mr. Waid's</p> <p>9 deposition as to his specific methodology that</p> <p>10 could be replicable, but Mr. Zoltowski used and</p> <p>11 took Mr. Waid's information whole cloth. He did</p> <p>12 not do his own analyses, and I was rebutting Mr.</p> <p>13 Zoltowski.</p> <p>14 Q. But you're not providing an affirmative opinion on</p> <p>15 the pricing of -- you're not providing an</p> <p>16 affirmative opinion on the sizing of Federal</p> <p>17 applications; isn't that right?</p> <p>18 A. My opinion, which is in my report, is that it was</p> <p>19 commercially unreasonable for FICO through its</p> <p>20 expert damages expert to make assumptions that are</p> <p>21 inconsistent with FICO's practices regarding its</p> <p>22 pricing. Even assuming that I made a mistake, and</p> <p>23 again, I'm human, I make mistakes, that doesn't</p> <p>24 change my opinion that was commercially</p> <p>25 unreasonable for Mr. Zoltowski on behalf of his</p>	<p style="text-align: right;">Page 185</p> <p>1 then ties into pricing that's commercially -- and</p> <p>2 along with other factors that I discuss in that</p> <p>3 section of my report.</p> <p>4 Q. Well, isn't your sizing of CSI Express as small in</p> <p>5 2019 inconsistent with the number of transactions</p> <p>6 that are reflected in Exhibit 16?</p> <p>7 A. I have two comments. Yes, it appears it to be,</p> <p>8 and second, it doesn't matter. Even if I made the</p> <p>9 mistake there, it doesn't matter to my overall</p> <p>10 opinion.</p> <p>11 There are a host of other factors which</p> <p>12 support my opinion that it was commercially</p> <p>13 unreasonable for Mr. Zoltowski on behalf of FICO</p> <p>14 to make those assumptions in his damages work</p> <p>15 because that's not how software -- again, customs</p> <p>16 and practices in the industry.</p> <p>17 If you don't price on applications, you</p> <p>18 price on enterprise. You give discounts just like</p> <p>19 FICO does. It's not just customs and practice in</p> <p>20 the industry. It's also FICO's own historic</p> <p>21 practices. That's what I'm providing an opinion</p> <p>22 on.</p> <p>23 Q. Exhibit 22 on Page 44 --</p> <p>24 A. One more question, and then I'd like a break.</p> <p>25 Okay. I'm there.</p>



<p style="text-align: right;">Page 186</p> <p>1 Q. Your sizing of the Federal international 2 applications is also predicated on your sizing of 3 CSI Express from 2019 as a small application; is 4 that correct?</p> <p>5 A. Exhibit 22 is more than that because Mr. Zoltowski 6 used software applications on an international 7 basis that do not use Blaze. That's commercially 8 -- and so that's part of what Exhibit 22 does, and 9 yes, I size them using CSI Express, and again, 10 even if we size them correctly, it doesn't matter. 11 My opinion remains the same. If I made a mistake, 12 the opinion is still the same, i.e., what I 13 discuss in Section C in regard to Mr. Zoltowski's 14 work on behalf of FICO.</p> <p>15 MS. KLIEBENSTEIN: Okay. We can take a 16 break.</p> <p>17 THE WITNESS: Thank you.</p> <p>18 THE VIDEOGRAPHER: We are going off the 19 record, and the time now is 4:23 p.m. 0 20 (Whereupon a short break was taken from 21 4:23 p.m. to 4:30 p.m.) 0</p> <p>22 THE VIDEOGRAPHER: We are back on the 23 record. This marks the beginning of Media 6 in 24 the deposition of Steven Kursh. The time now is 25 4:30 p.m. 0</p>	<p style="text-align: right;">Page 188</p> <p>1 A. The situation where, let's say for example, an 2 audit is done, a true-up, and it is discovered 3 that the licensee has made some mistakes in 4 reporting among usage, that the parties would come 5 together and negotiate additional licensing fees.</p> <p>6 Additionally another example would be here. 7 When the parties get together, given that there's 8 an enterprise license, then they would continue to 9 have an enterprise license. It would be unusual, 10 although it may happen, that the grant of the 11 license -- as the licensee, you would want the 12 grant of rights by the licensor to enable you to 13 continue doing business the same way you're doing 14 business, and as a licensor, the licensor can 15 decide what it wants to do, but relative to 16 customs and practices in the industry, you want 17 the parties to come together and negotiate, and it 18 would typically be in enterprise lawsuits.</p> <p>19 Q. Is it your opinion that the parties would do that 20 today. Or is your opinion based in 2016?</p> <p>21 A. I don't understand your question.</p> <p>22 Q. Well, I'm just trying to understand. We've had 23 three years, three-plus years of litigation. Is 24 it your opinion that today FICO should do an audit 25 and give Federal an enterprise-wide license?</p>
<p style="text-align: right;">Page 187</p> <p>1 BY MS. KLIEBENSTEIN: 2 Q. Is it your opinion that after this lawsuit was 3 filed Federal would have negotiated with FICO to 4 purchase an enterprise license for Blaze Advisor 5 instead of purchasing licenses on an application 6 by application basis?</p> <p>7 A. I've seen e-mail discussions -- this goes to Ms. 8 Tamara's -- Pawloski, in her deposition, some of 9 the back and forth. I can't speak on behalf of 10 what the thinking was from either FICO personnel, 11 or Federal.</p> <p>12 However given that an enterprise license 13 existed from December 2006, one would expect that 14 they would have -- they being both sides would 15 have done an enterprise license.</p> <p>16 Additionally as I noted earlier, Mr. Waid's 17 testimony in regard to applications versus 18 enterprise license also is there. If I may 19 rephrase, it would be enterprise licenses.</p> <p>20 Q. In Paragraph 126, the report states, "Most 21 enterprises would typically purchase enterprise 22 level licenses in this situation." Is that your 23 opinion?</p> <p>24 A. Yes.</p> <p>25 Q. And what do you mean by in this situation?</p>	<p style="text-align: right;">Page 189</p> <p>1 A. You've got a bunch of different issues in there. 2 If you could ask me different specific questions, 3 I'll do my best to answer.</p> <p>4 Q. In providing your opinion that most enterprises in 5 this situation would typically purchase enterprise 6 level licenses, are you presuming 10.8 is breached 7 or not?</p> <p>8 A. I'm assuming -- again, Paragraph 126 is in my 9 rebuttal to Mr. Zoltowski's report. Mr. Zoltowski 10 didn't consider enterprise licenses.</p> <p>11 When the party -- if -- Mr. Zoltowski in 12 doing his damages work, in my view, consistent 13 with customs and practices in the industry, 14 licensees and licensors have enterprise licenses 15 will continue to do so. Mr. Zoltowski provided, 16 nor did any of your other experts, provide any 17 reasoning nor evidence from filings by the parties 18 that would indicate it would be anything other 19 than an enterprise license.</p> <p>20 Now, that's the damages work, but you asked 21 me a different question before about what the 22 parties could or should have done, and if you ask 23 that question again, I will do my best to answer 24 it, but that's different than what Mr. Zoltowski 25 assumed, which is what I'm addressing in Paragraph</p>



<p style="text-align: right;">Page 190</p> <p>1 126.</p> <p>2 Q. Do you understand that Mr. Zoltowski and Mr.</p> <p>3 Bakewell, the damages experts in this case, they</p> <p>4 presume liability has been found in FICO's favor?</p> <p>5 A. Yes.</p> <p>6 Q. And do you understand that to mean they presume</p> <p>7 that Section 10.8 has been breached?</p> <p>8 A. They assume there's a breach, and again, they</p> <p>9 assume liability. Yes.</p> <p>10 Q. This is a breach of contract case; correct?</p> <p>11 A. Yes.</p> <p>12 Q. So it's your opinion critiquing Mr. Zoltowski that</p> <p>13 even if liability is found in FICO's favor Federal</p> <p>14 should still receive an enterprise level license?</p> <p>15 MR. FLEMING: Objection. Asked and</p> <p>16 answered.</p> <p>17 THE WITNESS: Yes. Because it's</p> <p>18 commercially reasonable in calculating what the</p> <p>19 license fee should be to consider the factors that</p> <p>20 I discuss in my report.</p> <p>21 BY MS. KLIEBENSTEIN:</p> <p>22 Q. And --</p> <p>23 A. When you think about -- again, what is the fair</p> <p>24 market value of the FICO software. That's a</p> <p>25 willing buyer and a willing seller. What are</p>	<p style="text-align: right;">Page 192</p> <p>1 in breach has to approach -- what is the support</p> <p>2 for your theory that a party in breach -- the</p> <p>3 amount that they have to pay in damages is based</p> <p>4 on an arm's length transaction?</p> <p>5 A. Well, first, again, I don't do damages work in</p> <p>6 this case. It -- going back though to a</p> <p>7 negotiation, hypothetical negotiation between the</p> <p>8 parties, these are, in my experience, customs and</p> <p>9 practices in the industry what parties typically</p> <p>10 do. It's what I state in Paragraph 126.</p> <p>11 In doing the damages, Mr. Zoltowski should</p> <p>12 have considered it, and it's commercially</p> <p>13 unreasonable, given what the -- FICO's history</p> <p>14 with licensing and pricing, particularly with</p> <p>15 respect to Federal, I note, for example, in some</p> <p>16 of the -- he used an application pricing or the</p> <p>17 enterprise pricing, and the -- I just -- it</p> <p>18 doesn't make sense, and Mr. Zoltowski in his</p> <p>19 deposition acknowledged he's not a software</p> <p>20 pricing expert. He talked about his background.</p> <p>21 I'm in the software industry. It is --</p> <p>22 companies will do an enterprise license in my</p> <p>23 opinion based on customs and practices.</p> <p>24 Q. How many instances have you been involved in</p> <p>25 pricing negotiations where one party was in breach</p>
<p style="text-align: right;">Page 191</p> <p>1 competitive products licensing for? What are --</p> <p>2 again, how much of value -- what does FICO charge</p> <p>3 for this, not the price list but for real, i.e.,</p> <p>4 the discounts, its price lists? That's what Mr.</p> <p>5 Zoltowski in my opinion should have considered,</p> <p>6 and it's commercially unreasonable for him not to</p> <p>7 have considered those factors.</p> <p>8 Q. And why was it commercially unreasonable for Mr.</p> <p>9 Zoltowski to not consider, as you say, an</p> <p>10 enterprise level license?</p> <p>11 A. Because companies in an arm's length transaction</p> <p>12 would typically do, as I state, an enterprise</p> <p>13 level license. If there's a disagreement -- going</p> <p>14 back to 2016, when there's a disagreement, the</p> <p>15 parties sit together, and you'd expect it to be an</p> <p>16 enterprise license because it was an enterprise</p> <p>17 license.</p> <p>18 Why in the world would a licensor in</p> <p>19 seeking a negotiation in good faith and a licensee</p> <p>20 in negotiation in good faith seek to substantially</p> <p>21 change the grant of rights? May it happen</p> <p>22 sometimes? Perhaps. I've not seen it, but it</p> <p>23 makes no -- again, given customs and practices in</p> <p>24 the industry, it would be an enterprise license.</p> <p>25 Q. What is the support for your theory that a party</p>	<p style="text-align: right;">Page 193</p> <p>1 of a contract for three years?</p> <p>2 A. Well, the way you've defined that is going to be</p> <p>3 very narrow. In terms of breach of contract for</p> <p>4 three years and one party, I have been involved in</p> <p>5 license negotiations where there have been, as I</p> <p>6 discussed earlier, true-ups and the rights that</p> <p>7 were granted after to be expanded, and the parties</p> <p>8 sit down and negotiate that. I've done that.</p> <p>9 With respect to three years, I don't recall</p> <p>10 the length of time, and again, your presumption of</p> <p>11 the breach occurring is, again, I -- going back to</p> <p>12 Section 10.8, there was no expanded use. It's</p> <p>13 commercially unreasonable for FICO through Mr.</p> <p>14 Zoltowski to use named applications rather than an</p> <p>15 enterprise license. As I state in my report.</p> <p>16 Q. So those examples of true-ups that you gave were</p> <p>17 you participating as a party to those negotiations</p> <p>18 or as an expert or a consultant?</p> <p>19 A. Consultant.</p> <p>20 Q. So you were not a party to those negotiations?</p> <p>21 A. No. Although when I was in software company,</p> <p>22 yeah, we had situations with true-ups so I was a</p> <p>23 party, and the way I chose to manage my company</p> <p>24 was that you understand the relationship, and you</p> <p>25 worked out a compromise between the parties</p>



<p style="text-align: right;">Page 194</p> <p>1 recognizing the market realities, competitive</p> <p>2 products, the value of keeping them as a licensee,</p> <p>3 what the software is doing for you there, how much</p> <p>4 would it cost to replicate the software within</p> <p>5 your organization. There are a variety of</p> <p>6 factors.</p> <p>7 Q. What is a true-up?</p> <p>8 A. A true-up is when the licensor, usually through a</p> <p>9 third party but they can do it on their own, will</p> <p>10 go in and audit the use of the software that's</p> <p>11 been licensed.</p> <p>12 Q. So, again, what is a -- a true-up is an audit?</p> <p>13 A. For example, if you say that -- maybe one of the</p> <p>14 metrics is number of active users, and the number</p> <p>15 of active users, I'm making this up, is 10,000,</p> <p>16 and the auditing process, the true-up process</p> <p>17 finds that it is 12,000, or similarly you have</p> <p>18 licenses where the fee will change. Suddenly</p> <p>19 instead of 10,000, it's 6000, and if the</p> <p>20 provisions are in the agreements between the</p> <p>21 licensor and licensee that the maintenance fees</p> <p>22 will go down, then the licensor trues-up and makes</p> <p>23 up for it, or if the licensee is using it more,</p> <p>24 the licensee make up for it, and typically that's</p> <p>25 set up within a particular time frame, 60-90 days,</p>	<p style="text-align: right;">Page 196</p> <p>1 agreed to in 2006, and that the parties</p> <p>2 acknowledge throughout the licensing relationship</p> <p>3 prior to the merger in 2016.</p> <p>4 So it is my understanding that it's</p> <p>5 commercially unreasonable for FICO to go against</p> <p>6 its own practices with respect to Federal when</p> <p>7 they claimed this breach and claimed they didn't</p> <p>8 know about the international usage.</p> <p>9 Q. But again, you understand that Mr. Zoltowski and</p> <p>10 Mr. Bakewell presume liability; correct?</p> <p>11 MR. FLEMING: Objection. That's been asked</p> <p>12 and answered repeatedly.</p> <p>13 THE WITNESS: Yes.</p> <p>14 BY MS. KLIEBENSTEIN:</p> <p>15 Q. And FICO offered a true-up license fee didn't it</p> <p>16 at that time?</p> <p>17 A. I found in the discussions of what FICO offered to</p> <p>18 be commercially unreasonable. Although FICO could</p> <p>19 choose to charge whatever it wanted to, but I</p> <p>20 found the constraints under the proposal of Option</p> <p>21 1 and Option 2, and Miss Pawloski's response, but</p> <p>22 particularly the way in which FICO handled it, it</p> <p>23 was their choice to handle it that way, but I</p> <p>24 found it to be commercially unreasonable given</p> <p>25 customs and practices in the industry, and again,</p>
<p style="text-align: right;">Page 195</p> <p>1 but it's really negotiated between the parties.</p> <p>2 Q. Did you read the communications back and forth</p> <p>3 between the parties in 2016?</p> <p>4 A. That's a broad question. You'll need to show me</p> <p>5 specific communications between the parties, and</p> <p>6 I'll say yes I recall seeing that, or gosh, I</p> <p>7 don't recall seeing that, but you'll need to show</p> <p>8 me. I did look at communications between the</p> <p>9 parties in 2016. I discussed that earlier today.</p> <p>10 Q. So you did look at the negotiations between the</p> <p>11 parties after the notice letter went out and prior</p> <p>12 to termination of the contract?</p> <p>13 A. Yes. I can't say I looked at all of them, but</p> <p>14 yes. You'll have to show me specific documents.</p> <p>15 Q. And do you recall from the communications that</p> <p>16 FICO alerted Federal to certain uses,</p> <p>17 international uses that FICO believed were outside</p> <p>18 the scope of the license?</p> <p>19 A. This is discussed in my report. FICO raised the</p> <p>20 international use -- I discuss this in my report.</p> <p>21 If you turn please to Page 12, and this is</p> <p>22 further discussed in my report, Paragraph 45, "The</p> <p>23 actions include but were not limited to the</p> <p>24 following," these are FICO's, asserting the</p> <p>25 license agreement do not allow uses the parties</p>	<p style="text-align: right;">Page 197</p> <p>1 going back to my report, yes, I understand Mr.</p> <p>2 Bakewell and Mr. Zoltowski assume liability.</p> <p>3 My report notes that, again, well, I'll</p> <p>4 just say this generally, the question of liability</p> <p>5 will be determined by the trier of fact. However,</p> <p>6 again, as I discuss in my report, and it's</p> <p>7 summarized in Paragraph 45.</p> <p>8 Q. But FICO did offer a true-up fee in 2016, you just</p> <p>9 don't agree with the amount; correct?</p> <p>10 MR. FLEMING: Objection. Asked and</p> <p>11 answered.</p> <p>12 THE WITNESS: I'll need to see the</p> <p>13 documents. What I recall is FICO came forward</p> <p>14 with some offers that, again, drawing from customs</p> <p>15 and practices in the industry, I mean, we have to</p> <p>16 go back to the basic presumption of your question,</p> <p>17 which is based on my reading of 10.8 there was no</p> <p>18 expanded use. Done.</p> <p>19 Based on my reading of 10. -- of further</p> <p>20 work, FICO's demands with respect to the use of</p> <p>21 Blaze Advisor FICO well knew that Blaze Advisor --</p> <p>22 again, FICO had made -- changed well over \$6</p> <p>23 million dollars in this relationship. The parties</p> <p>24 went back and forth. They could not reach a --</p> <p>25 grounds for negotiation, and hence, that's why</p>



<p style="text-align: right;">Page 198</p> <p>1 we're here today.</p> <p>2 BY MS. KLIEBENSTEIN:</p> <p>3 Q. So your opinions on this hypothetical negotiation</p> <p>4 do not presume that Federal breached the contract;</p> <p>5 isn't that right?</p> <p>6 A. No. Now, again, what I said was that the parties</p> <p>7 should have a negotiation, but the issue of breach</p> <p>8 is a separate question. Whether there's a breach</p> <p>9 -- again, I did not do damages in this case.</p> <p>10 What I said about the damages work of Mr.</p> <p>11 Zoltowski is that I disagreed given customs and</p> <p>12 practices in the industry with many of his</p> <p>13 assumptions. I disagree with his taking Mr.</p> <p>14 Waid's numbers whole cloth and not confirming</p> <p>15 that. I disagree with other parts of his work as</p> <p>16 well, but Mr. Bakewell handles the damages work.</p> <p>17 I don't.</p> <p>18 I stand by the opinions in my report, but I</p> <p>19 cannot provide, you know, whether I assume a</p> <p>20 breach or not that's the damages people. That's</p> <p>21 not me in my work in this matter.</p> <p>22 Q. I'm just trying to understand the baseline for the</p> <p>23 first sentence in 126, "Most enterprises would</p> <p>24 typically purchase enterprise level licenses in</p> <p>25 this situation."</p>	<p style="text-align: right;">Page 200</p> <p>1 "purchases licenses that are not enterprise level.</p> <p>2 For example, software used by analyzing laboratory</p> <p>3 results would be licensed by life scientist</p> <p>4 companies just for the people and use of their</p> <p>5 labs." So that would be an exception.</p> <p>6 Given that Blaze was not used in many of</p> <p>7 Federal's applications, it is possible that</p> <p>8 Federal could have licensed just usage rights for</p> <p>9 the applications.</p> <p>10 Under that assumption however, FICO</p> <p>11 mistakenly assumes that a higher number of Federal</p> <p>12 applications would need to license Blaze. This</p> <p>13 assumption is incorrect given the facts and</p> <p>14 evidence.</p> <p>15 So if you want to go the route saying it's</p> <p>16 applications, then you should use specifically the</p> <p>17 applications that had Blaze Advisor, and then the</p> <p>18 question becomes, among other questions, the</p> <p>19 negotiation between the parties, but it -- I don't</p> <p>20 understand why if companies -- licensees have an</p> <p>21 enterprise level license why they would then</p> <p>22 change that to less except, for example, like the</p> <p>23 life sciences companies, but even that, lower</p> <p>24 administrative fees, ease of use avoids conflict</p> <p>25 are some of the benefits. Other ones as well if</p>
<p style="text-align: right;">Page 199</p> <p>1 MR. FLEMING: So what's the question?</p> <p>2 BY MS. KLIEBENSTEIN:</p> <p>3 Q. My question is this. The -- you just gave me</p> <p>4 testimony that the amount FICO offered to resolve</p> <p>5 this matter in 2016 was unreasonable based on</p> <p>6 customs and practices in the industry. Can you</p> <p>7 identify those customs and practices in the</p> <p>8 industry for me?</p> <p>9 A. Sure. Actually, I reference some in Paragraph</p> <p>10 126. Let's read the entire paragraph.</p> <p>11 "Most enterprises would typically purchase</p> <p>12 enterprise level licenses in this situation. An</p> <p>13 enterprise level license provides several</p> <p>14 advantages to both licensors and licensees,</p> <p>15 including, but not limited to, lower ongoing</p> <p>16 administrative costs (e.g., true-ups), average</p> <p>17 lower license fees per user, and flexibility</p> <p>18 within organizations regarding allocation of</p> <p>19 software usage rights."</p> <p>20 Then I reference Paragraph -- excuse me,</p> <p>21 Footnote 52, and I state, "I note however that in</p> <p>22 some circumstances, particularly when a software</p> <p>23 program, is to be only," -- I should have used "by</p> <p>24 a specific group type of analysis or smaller</p> <p>25 entity within an organization that licenses," --</p>	<p style="text-align: right;">Page 201</p> <p>1 you ask.</p> <p>2 Q. 126 provides opinions from the licensee's</p> <p>3 perspective but does not provide opinions relating</p> <p>4 to the licensor's perspective in that hypothetical</p> <p>5 negotiation; correct?</p> <p>6 A. Incorrect. Incorrect.</p> <p>7 Q. Paragraph 126?</p> <p>8 MR. FLEMING: Objection. Asked and</p> <p>9 answered.</p> <p>10 THE WITNESS: Second sentence, "An</p> <p>11 enterprise level license provides several</p> <p>12 advantages to both licensors and licensees."</p> <p>13 From the perspective of a licensor, the</p> <p>14 licensor benefits as well with an enterprise level</p> <p>15 license; lower administrative costs, average lower</p> <p>16 license fees, having a happy licensee that you can</p> <p>17 use as a reference that you can gain your</p> <p>18 business, and quite frankly, having managed</p> <p>19 software companies, not really a good idea to be</p> <p>20 suing your licensees.</p> <p>21 You want to work this out because once that</p> <p>22 becomes out there, boy, your competitors are going</p> <p>23 to make hay about it. So licensors clearly</p> <p>24 benefit by it's a win-win by both sides on</p> <p>25 enterprise license agreements.</p>



<p style="text-align: right;">Page 202</p> <p>1 BY MS. KLIEBENSTEIN:</p> <p>2 Q. Is it your opinion that in this hypothetical</p> <p>3 negotiation FICO -- or that Federal would have</p> <p>4 received a discount?</p> <p>5 A. It's my opinion that in order to -- you'll need to</p> <p>6 speak with the people -- what was your question</p> <p>7 again? I think you said FICO received a discount.</p> <p>8 Q. Is it your opinion that in this hypothetical</p> <p>9 negotiation Federal would have received a</p> <p>10 discount?</p> <p>11 A. It's my opinion that Mr. Zoltowski made a mistake</p> <p>12 in not considering discounts. Mr. Zoltowski could</p> <p>13 have said, for example, in his report assuming a</p> <p>14 discount, assuming an enterprise license, assuming</p> <p>15 the following, as I discuss in my report in</p> <p>16 Section C, the damages will be X, assuming -- and</p> <p>17 he could have done a chart explaining each one of</p> <p>18 those factors.</p> <p>19 He could have also, as I've said multiple</p> <p>20 times today, sought to confirm Mr. Waid's numbers,</p> <p>21 but he didn't do that, and it's commercially</p> <p>22 unreasonable, as I've testified to already today,</p> <p>23 to ask for damages that are far in excess of what</p> <p>24 we see in customs and practices in the industry.</p> <p>25 Q. Your report next discusses audit rights. Well,</p>	<p style="text-align: right;">Page 204</p> <p>1 agreement in 2016?</p> <p>2 A. I've not spoken to anyone from FICO in this</p> <p>3 matter, but I have not seen any evidence produced</p> <p>4 by FICO, FICO's counsel, FICO's experts that state</p> <p>5 that FICO asked for an audit and was turned down.</p> <p>6 Q. Can you turn to Section 10.4 of Deposition Exhibit</p> <p>7 314.</p> <p>8 A. Where are you at in here?</p> <p>9 Q. Section 10.4, no waiver.</p> <p>10 A. What page is that on?</p> <p>11 Q. FICO 2282.</p> <p>12 A. I see it.</p> <p>13 Q. Have you seen waiver provisions in other software</p> <p>14 license agreements?</p> <p>15 A. Yes.</p> <p>16 Q. Are they common in the industry?</p> <p>17 A. One typically sees a waiver provision, no waiver</p> <p>18 provision.</p> <p>19 Q. Section 10.5, entire agreement.</p> <p>20 A. Yes.</p> <p>21 Q. Have you seen sections like that in other software</p> <p>22 license agreements?</p> <p>23 A. Yes.</p> <p>24 Q. Are entire agreement terms common as well in</p> <p>25 software license agreements?</p>
<p style="text-align: right;">Page 203</p> <p>1 let me back up. Your opinions on the enterprise</p> <p>2 license issue, in Paragraphs 125 through 131, your</p> <p>3 support for those opinions is FICO's -- FICO's</p> <p>4 behavior and Federal's behavior; correct?</p> <p>5 A. My opinions are what's in the report. I don't</p> <p>6 recall using the word behaviors.</p> <p>7 Q. Well, I'll ask it another way. Documents and</p> <p>8 deposition testimony that relate to FICO's</p> <p>9 behavior and Federal's behavior; correct?</p> <p>10 A. I don't understand your question. My report</p> <p>11 stands as it is. We've gone through it today. I</p> <p>12 don't understand your question.</p> <p>13 Q. And then your opinions on Paragraphs 134 through</p> <p>14 136 your support for those opinions are documents</p> <p>15 and deposition testimony in this case; correct?</p> <p>16 A. My opinions are based on my expertise in reviewing</p> <p>17 the evidence in this matter. That expertise is</p> <p>18 customs and practices in the software industry.</p> <p>19 That's my opinions. In reaching my opinions, I</p> <p>20 cite to evidence produced by the parties.</p> <p>21 Q. Do you know if FICO could pursue an audit right</p> <p>22 now?</p> <p>23 A. I don't.</p> <p>24 Q. Did you ask anyone at FICO why they did not</p> <p>25 request a formal audit under Section 3.5 of the</p>	<p style="text-align: right;">Page 205</p> <p>1 A. I'll respond to that in two ways. The first is,</p> <p>2 again, I've seen both 10.4 and 10.5 although with</p> <p>3 different language in my experience software</p> <p>4 agreements.</p> <p>5 I've also seen, for example, under new</p> <p>6 waiver issues of course of performance, and again,</p> <p>7 this -- again, I'm not providing contract</p> <p>8 interpretation. The issue is the relationship</p> <p>9 between the parties and the actions the parties</p> <p>10 take toward one another, and my opinions call out</p> <p>11 in my report -- are called out in my report.</p> <p>12 Q. With respect to the hypothetical negotiation on</p> <p>13 the enterprise license, are you presuming during</p> <p>14 that hypothetical negotiation that Federal would</p> <p>15 offer to buy the products from FICO?</p> <p>16 A. That would be between the parties.</p> <p>17 Q. Are you presuming that Federal would offer to</p> <p>18 receive additional professional services from</p> <p>19 FICO?</p> <p>20 A. Again, between the parties. This is all</p> <p>21 negotiable and is not simply additional products</p> <p>22 or additional services is what would be charged.</p> <p>23 Fundamentally, in my -- in my expertise</p> <p>24 based on, again, knowledge, training, experience,</p> <p>25 education, it really gets down to what's the</p>




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1 bottom line, how much money is being exchanged  
 2 between the parties, and what is being exchanged  
 3 for that money.  
 4 Q. And --  
 5 A. So you can have a mix of software products,  
 6 services, support maintenance. Really depends on  
 7 what's -- what are the concerns of the respective  
 8 parties, along with issues we've talked about  
 9 today; reputational gains, value of a licensee,  
 10 Tier I in particular, along with the other factors  
 11 we discussed today, and other factors I can think  
 12 as well if you'd like to give me time.  
 13 Q. Were you presuming that Federal and FICO would  
 14 enter into a long-term relationship?  
 15 A. How are you defining long-term?  
 16 Q. Longer than five years?  
 17 A. Industry moves pretty fast, you know, the -- I've  
 18 seen a switch in the industry from perpetual  
 19 licenses back to term licenses. This would be  
 20 negotiated between the parties.  
 21 I do recall that Federal came forward with  
 22 a proposal for about just over \$800,000 during the  
 23 negotiation as well as support maintenance fees of  
 24 \$343,000. If you put a cap rate on that of 5  
 25 percent or even 10 percent, it's a pretty big

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1 number for support maintenance going to value to  
 2 FICO. Again, that's just my work, but Mr.  
 3 Bakewell did the damages.  
 4 Q. And that number that you just referenced, that  
 5 \$800,000 number, do you view that to be  
 6 commercially reasonable?  
 7 A. I believe that the -- it's not the number  
 8 specifically. It is the parties' working together  
 9 to reach a resolution and being flexible so that  
 10 we don't get into the situation like we're here  
 11 today.  
 12 MS. KLIEBENSTEIN: All right. No further  
 13 questions.  
 14 MR. FLEMING: All right. I have no further  
 15 questions. We will read and sign.  
 16 MS. KLIEBENSTEIN: Okay.  
 17 THE VIDEOGRAPHER: This marks the end of  
 18 the deposition. The time now is 5:05 p.m., and  
 19 we're off the record.  
 20 (Whereupon the deposition adjourned at 5:05  
 21 p.m.)  
 22  
 23  
 24  
 25

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1 STATE OF MINNESOTA )  
 2 ) SS  
 3 COUNTY OF HENNEPIN )  
 4  
 5 I Jacqueline McKone, certified shorthand reporter  
 6 and notary public for the State of Minnesota,  
 7 certify there came before me the deponent herein  
 8 who was sworn by me to testify to the truth  
 9 concerning the matters in the cause, and I certify  
 10 this transcript is a true transcript of my  
 11 original shorthand notes.  
 12 I certify I am neither attorney nor counsel for,  
 13 nor related to, nor employed by any of the parties  
 14 to the action in which this deposition is taken;  
 15 and furthermore, I am not a relative or employee  
 16 of any attorney or counsel employed by the parties  
 17 hereto or financially interested in this action.  
 18  
 19 The cost of the original transcript has been  
 20 charged to the party noticing the deposition, and  
 21 all parties ordering copies are charged at the  
 22 same rate for such copies.  
 23  
 24 IN WITNESS WHEREOF, I have affixed my notary seal  
 25 this day: 27 June 2019  
  
 JACQUELINE MCKONE

Page 209

1 Veritext Legal Solutions  
 2 1100 Superior Ave  
 3 Suite 1820  
 4 Cleveland, Ohio 44114  
 5 Phone: 216-523-1313  
 6  
 7 June 27, 2019  
 8 To: Terrence Fleming, Esq.  
 9  
 10 Case Name: Fair Isaac Corporation v. Federal Insurance Company  
 11 Veritext Reference Number: 3390647  
 12  
 13 Witness: Steven Kursh Deposition Date: 6/25/2019  
 14  
 15 Dear Sir/Madam:  
 16  
 17 Enclosed please find a deposition transcript. Please have the witness  
 18 review the transcript and note any changes or corrections on the  
 19 included errata sheet, indicating the page, line number, change, and  
 20 the reason for the change. Have the witness' signature notarized and  
 21 forward the completed page(s) back to us at the Production address  
 22 shown  
 23 above, or email to production-midwest@veritext.com.  
 24  
 25 If the errata is not returned within thirty days of your receipt of  
 this letter, the reading and signing will be deemed waived.  
 Sincerely,  
 Production Department  
 NO NOTARY REQUIRED IN CA



Page 210	Page 212
<p>1 DEPOSITION REVIEW CERTIFICATION OF WITNESS</p> <p>2 ASSIGNMENT REFERENCE NO: 3390647</p> <p>3 CASE NAME: Fair Isaac Corporation v. Federal Insurance Company</p> <p>4 DATE OF DEPOSITION: 6/25/2019</p> <p>5 WITNESS' NAME: Steven Kursh</p> <p>6 In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.</p> <p>7 I have made no changes to the testimony as transcribed by the court reporter.</p> <p>8</p> <p>9 Date Steven Kursh</p> <p>10 Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:</p> <p>12 They have read the transcript; 13 They signed the foregoing Sworn Statement; and 14 Their execution of this Statement is of their free act and deed.</p> <p>15 I have affixed my name and official seal</p> <p>16 this _____ day of _____, 20____.</p> <p>17</p> <p>18 Notary Public</p> <p>19 Commission Expiration Date</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 ERRATA SHEET</p> <p>2 VERITEXT LEGAL SOLUTIONS MIDWEST</p> <p>3 ASSIGNMENT NO: 3390647</p> <p>4 PAGE/LINE(S) / CHANGE /REASON</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p> <p>11 _____</p> <p>12 _____</p> <p>13 _____</p> <p>14 _____</p> <p>15 _____</p> <p>16 _____</p> <p>17 _____</p> <p>18 _____</p> <p>19 _____</p> <p>20 Date Steven Kursh</p> <p>21 SUBSCRIBED AND SWORN TO BEFORE ME THIS _____</p> <p>22 DAY OF _____, 20____.</p> <p>23</p> <p>24 Notary Public</p> <p>25 Commission Expiration Date</p>
<p>Page 211</p> <p>1 DEPOSITION REVIEW CERTIFICATION OF WITNESS</p> <p>2 ASSIGNMENT REFERENCE NO: 3390647</p> <p>3 CASE NAME: Fair Isaac Corporation v. Federal Insurance Company</p> <p>4 DATE OF DEPOSITION: 6/25/2019</p> <p>5 WITNESS' NAME: Steven Kursh</p> <p>6 In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.</p> <p>7 I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).</p> <p>8 I request that these changes be entered as part of the record of my testimony.</p> <p>9</p> <p>10 I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.</p> <p>12</p> <p>13 Date Steven Kursh</p> <p>14 Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:</p> <p>17 They have read the transcript; They have listed all of their corrections in the appended Errata Sheet; 18 They signed the foregoing Sworn Statement; and 19 Their execution of this Statement is of their free act and deed.</p> <p>20 I have affixed my name and official seal</p> <p>21 this _____ day of _____, 20____.</p> <p>22</p> <p>23 Notary Public</p> <p>24</p> <p>25 Commission Expiration Date</p>	



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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.



VERITEXT LEGAL SOLUTIONS  
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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